CLERK'S COPY.

149

575.70

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 40

MIDSTATE HORTICULTURAL CO., INC.,
PETITIONER,

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED APRIL 12, 1943.

CERTIORARI GRANTED MAY 24, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

MID-STATE HORTICULTURAL CO., INC.,
PETITIONER,

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX.

	Original	Print
Record from the Superior Court of California, Fresno County	1	1
First amended complaint	1	1
Exhibit "A"—Bill of lading	53a	38
Exhibit "B"—Notice executed by Jerome Distributing Co. as to ownership of shipment of grapes	53c	39
Exhibit "C"—Waiver of statute of limitations	53d	39
Demurrer to first amended complaint	54	41
Order overruling demurrer to first amended complaint	66	49
Notice of association of counsel for defendant	67	49
Notice of motion for order granting leave to file amended answer	68	50
Order granting motion to file amended answer	71	51
Amended answer to amended complaint	72	51
Demurrer to defendant's amended answer	112	77
Points and authorities in support of plaintiff's demurrer to amended answer	113	78
Notice and motion to strike out portions of defendant's amended answer	114	78
Points and authorities in support of motion to strike portions of amended answer	118	81
Order sustaining demurrer to fourth defense of amended answer and granting motion to strike	120	82
Findings of fact and conclusions of law	121	82
Judgment	127	86

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 26, 1943.

—4801

Record from the Superior Court of California, Fresno County—Continued	Original	Print
Notice of appeal to Supreme Court of California	129	87
Notice to clerk to prepare papers for record on appeal	131	88
Stipulation to omit from record certain exhibits	133	89
Clerk's certificate to record (omitted in printing)	136	
Reporter's transcript of evidence	138	90
Appearances	138	90
Colloquy between court and counsel	138	91
Testimony of John Savage, Jr. (deposition)	142	93
Cross examination	170	111
Redirect examination	186	122
Recross examination	189	124
Testimony of Gilbert C. Freeauf (deposition)	190	125
Cross examination	202	133
Redirect	205	135
Testimony of Arpaxat Setrakian	216	142
Reporter's certificate to transcript (omitted in printing)	242	
Judge's certificate settling transcript	244	158
Plaintiff's exhibits:		
1—Check No. 7701 dated Nov. 12, 1932, Jerome Distributing Co. to Pennsylvania R. R. Co.	245	159
2—Check No. 7707 dated Nov. 22, 1932, Jerome Dist. Co. to Pennsylvania R. R. Co	246	160
3—Notice of nonpayment of check #7707	247	161
4—Notice of nonpayment of check #7701	248	162
5—Check No. 7696 dated November 19, 1932, Jerome Dist. Co. to Pa. R. R. Co.	249	163
6—Notice of nonpayment of check No. 7969	250	164
7—Two accounting sheets, returned items	251	165
8—Two accounting sheets, returned items	253	166
9—Order of Interstate Commerce Commission dated Jan. 20, 1931	207	137
Defendant's exhibits:		
A—Telegram dated Dec. 6, 1932, Mid-State to Roberts	229	152
B—Telegram dated Dec. 7, 1932, Roberts to Mid-State	230	152
C—Freight bill—Pennsylvania R. R. Co	254	170
Proceedings in District Court of Appeal, Fourth Appellate District	255	171
Order of Supreme Court transferring case to District Court of Appeal, Fourth Appellate District	255	171
Opinion of court, Marks, J.	256	171
Dissenting opinion by Schottky, J.	272	179
Proceedings in the Supreme Court of California	296	192
Petition for hearing after decision in the District Court of Appeal	296	192
Order granting hearing	303	195
Opinion of court, Shenk, J.	304	196
Order denying rehearing	312	205
Judgment	313	205
Clerk's certificate to transcript (omitted in printing)	314	
Order allowing certiorari		207

[fol. 1]

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

No. 54060 Dept. 3

THE PENNSYLVANIA RAILROAD COMPANY, a corporation,
Plaintiff

vs.

MID-STATE HORTICULTURAL CO., INC., a corporation,
Defendant

FIRST AMENDED COMPLAINT—Filed July 15, 1936

Comes now the plaintiff and of course files this first amended complaint and for first cause of action alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of California.

III

That the Atchison, Topeka & Santa Fe Railway Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 7th day of October, 1932, the de-
[fol. 2] fendant, as consignor, delivered to the Atchison, Topeka & Santa Fe Railway Company at Conejo, California, a carload of grapes loaded in car SFRD 17404 consigned to defendant at Kansas City, Missouri, to be shipped over the railroad lines of the Atchison, Topeka & Santa Fe Railway Company pursuant to the provisions of the uniform bill of lading executed by the defendant and

Atchison, Topeka & Santa Fe Railway Company, a copy of which is attached hereto marked Exhibit "A", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Belen, New Mexico; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Atchison, Topeka & Santa Fe Railway Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 19th day of November, 1932, and that the plaintiff, the Atchison, Topeka & Santa Fe Railway Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

[fol. 3] That at all times herein mentioned said defendant was the owner and the actual consignee of all of the said carload of grapes and said Jerome Distributing Co., Inc. was the agent of said defendant; that Jerome Distributing Co., Inc. signed and delivered to plaintiff prior to the delivery of said carload of grapes a notice dated November 19, 1932, a copy of which is attached hereto marked Exhibit "B", hereby referred to and made a part hereof for all purposes.

VIII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $695.51.

IX

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the

statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

X

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $695.51 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $695.51 is now due, owing and unpaid from [fol. 4] the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 19th day of November, 1932.

And for a second cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

III

That the Atchison, Topeka & Santa Fe Railway Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 6th day of October, 1932, the defendant, as consignor, delivered to the Atchison, Topeka & Santa Fe Railway Company, at Conejo, California, a carload of grapes loaded in car SFRD 22471 consigned to defendant at Kansas City, Missouri, to be shipped over the railroad lines of the Atchison, Topeka & Santa Fe Railway Company, pursuant to the provisions of the uni-

form bill of lading executed by the defendant and Atchi-
[fol. 5] son, Topeka & Santa Fe Railway Company, a copy of which is attached hereto marked Exhibit "D", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Minneapolis, Minnesota; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Atchison, Topeka & Santa Fe Railway Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 28th day of October, 1932, and that the plaintiff, the Atchison, Topeka & Santa Fe Railway Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That at all times herein mentioned said defendant was the owner and the actual consignee of all of the said carload of grapes and said Jerome Distributing Co., Inc. was the agent of said defendant; that Jerome Distributing Co., Inc. signed and delivered to plaintiff prior to the delivery of said carload of grapes a notice dated October 28, 1932, [fol. 6] a copy of which is attached hereto marked Exhibit "E", hereby referred to and made a part hereof for all purposes.

VIII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $698.33.

IX

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

X

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act, plaintiff demanded payment of said sum of $698.33 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $698.33 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 28th day of October, 1932.

And for a third cause of action against the defendant, plaintiff alleges:

I

[fol. 7] That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 22nd day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Cooperage Spur, California, a carload of grapes loaded in car PFE 13520 consigned to the defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provi-

sions of the uniform bill of lading executed by the defendant and Southern Pacific Company, a copy of which is attached hereto marked Exhibit "F", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

[fol. 8] VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 2nd day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That at all times herein mentioned said defendant was the owner and the actual consignee of all of the said carload of grapes and said Jerome Distributing Co., Inc. was the agent of said defendant; that Jerome Distributing Co., Inc. signed and delivered to plaintiff prior to the delivery of said carload of grapes a notice dated November 12, 1932, a copy of which is attached hereto marked Exhibit "G", hereby referred to and made a part hereof for all purposes.

VIII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $617.58.

IX

[fol. 9] That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the

statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

X

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $617.58 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $617.58 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 2nd day of November, 1932.

And for a fourth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation [fol. 10] operating steam railroad lines as a common carrier.

IV

That on or about the 22nd day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Cooperage Spur, California, a carload of grapes loaded in car PFE 71996 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of the uniform bill of lading executed by the defendant and Southern Pacific Company, a copy of which is attached hereto marked Exhibit "H", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 1st day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

[fol. 11]

VII

That at all times herein mentioned said defendant was the owner and the actual consignee of all of the said carload of grapes and said Jerome Distributing Co., Inc. was the agent of said defendant; that Jerome Distributing Co., Inc. signed and delivered to plaintiff prior to the delivery of said carload of grapes a notice dated November 4, 1932, a copy of which is attached hereto marked Exhibit "I", hereby referred to and made a part hereof for all purposes.

VIII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $619.18.

IX

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

X

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $619.18 from the defendant and the defendant definitely refused to [fol. 12] pay said sum or any part thereof and that the said sum of $619.18 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 1st day of November, 1932.

And for a fifth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Atchison, Topeka & Santa Fe Railway Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 22nd day of October, 1932, the defendant, as consignor, delivered to the Atchison, Topeka & Santa Fe Railway Company at New House, California, a carload of grapes loaded in car SFRD 18007 consigned to defendant at Kansas City, Missouri, to be shipped over the railroad lines of the Atchison, Topeka & Santa Fe Railway Company pursuant to the provisions of the uniform bill of lading executed by the defendant the Atchison, Topeka & [fol. 13] Santa Fe Railway Company, a copy of which is attached hereto marked Exhibit "J", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at

Belen, New Mexico; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Atchison, Topeka & Santa Fe Railway Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 1st day of November, 1932, and that the plaintiff, the Atchison, Topeka & Santa Fe Railway Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That at all times herein mentioned said defendant was the owner and the actual consignee of all of the said carload of grapes and said Jerome Distributing Co., Inc. was the agent of said defendant; that Jerome Distributing Co., Inc. signed and delivered to plaintiff prior to the delivery of said carload of grapes a notice dated November 4, 1932, a [fol. 14] copy of which is attached hereto marked Exhibit "K", hereby referred to and made a part hereof for all purposes.

VIII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $621.58.

IX

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

X

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce

Act plaintiff demanded payment of said sum of $621.58 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $621.58 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 1st day of November, 1932.

And for a sixth cause of action against the defendant, plaintiff alleges:

I

[fol. 15] That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 9th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 28824 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of the uniform bill of lading executed by the defendant and Southern Pacific Company, a copy of which is attached hereto marked Exhibit "L", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

[fol. 16]

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 21st day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That at all times herein mentioned said defendant was the owner and the actual consignee of all of the said carload of grapes and said Jerome Distributing Co., Inc. was the agent of said defendant; that Jerome Distributing Company signed and delivered to plaintiff prior to the delivery of said carload of grapes a notice dated November 19, 1932, a copy of which is attached hereto marked Exhibit "M", hereby referred to and made a part hereof for all purposes.

VIII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $667.33.

IX

[fol. 17] That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

X

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $667.33 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of

$667.33 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 21st day of November, 1932.

And for a seventh cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation op- [fol. 18] erating steam railroad lines as a common carrier.

IV

That on or about the 8th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 36495 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and Southern Pacific Company, a copy of which is attached hereto marked Exhibit "N", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its

connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 18th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

[fol. 19] VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $687.73.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $687.73 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $687.73 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 18th day of November, 1932.

And for an eighth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of [fol. 20] Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 8th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 24375 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit "O", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the [fol. 21] steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 18th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance

with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $683.83.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $683.83 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $683.83 [fol. 22] is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 18th day of November, 1932.

And for a ninth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 22nd day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 1478 consigned to defendant at Denver, Colorado, to be shipped over the railroad lines of the Southern

Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and Southern Pacific Company, a copy of which is attached hereto marked Exhibit "PP", hereby referred to and made a part hereof for all purposes.

V

[fol. 23] That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 1st day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $660.43.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

[fol. 24] That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $660.43 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $660.43 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at

the rate of 7% per annum from the 1st day of November, 1932.

And for a tenth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 29th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 71971 consigned to defendant at Omaha, [fol. 25] Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit "Q", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Chicago, Illinois; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Pier 29, New York City, New York.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing

Co., Inc. at Pier 29, New York City, New York, on the 22nd day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions [fol. 26] of the Inter-State Commerce Act is the sum of $589.38.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $589.38 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $589.38 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 22nd day of November, 1932.

And for an eleventh cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of [fol. 27] California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 6th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 36105 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and Southern Pacific Company, a copy of which is attached hereto marked Exhibit "R", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 28th day of October, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers per- [fol. 28] formed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $689.73.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $689.73 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $689.73 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 28th day of October, 1932.

And for a twelfth cause of action against the defendant, plaintiff alleges:

[fol. 29]

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 22nd day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California; a carload of grapes loaded in car PFE 14745 consigned to defendant at Denver, Colorado, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and Southern Pacific Company, a copy of which is attached hereto marked Ex-

hibit "S", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Denver, Colorado; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan [fol. 30] Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 1st day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $662.83.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce [fol. 31] Act plaintiff demanded payment of said sum of $662.83 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $662.83 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon

at the rate of 7% per annum from the 1st day of November, 1932.

And for a thirteenth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 7th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 13607 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of [fol. 32] lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit "T", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Piers, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Piers, New Jersey, on the 18th day

of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $670.33.

VIII

[fol. 33] That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $670.33 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $670.33 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 18th day of November, 1932.

And for a fourteenth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation [fol. 34] operating steam railroad lines as a common carrier.

IV

That on or about the 7th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality,California, a carload of grapes loaded in car PFE 15847 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit "U", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 18th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

[fol. 35]

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $658.13.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $658.13 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $658.13 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 18th day of November, 1932.

And for a fifteenth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of [fol. 36] Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 8th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 71402 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked

Exhibit "V", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the [fol. 37] steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 18th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $682.63.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $682.63 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of [fol. 38] $682.63 is now due, owing and unpaid from the

defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 18th day of November, 1932.

And for a sixteenth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 27th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 35599 consigned to defendant at Manhattan Produce Yards, New Jersey, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit "W", hereby referred to and made a part hereof for all purposes.

[fol. 39] That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Chicago, Illinois; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing

Co., Inc. at Manhattan Produce Yards, New Jersey, on the 18th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $638.33.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked [fol. 40] Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $638.33 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $638.33 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 18th day of November, 1932.

And for a seventeenth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 31st day of October, 1932, the defend- [fol. 41] ant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 71097 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit "X", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Chicago, Illinois; that thereafter said carload of grapes was diverted to Jero. e Distributing Co., Inc. at Pier 28, New York City, New York.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Pier 28, New York City, New York, on the 21st day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery [fol. 42] of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $583.38.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $583.38 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $583.38 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 21st day of November, 1932.

And for an eighteenth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

[fol. 43] That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 23rd day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 14118 consigned to defendant at Denver, Colorado, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and Southern Pacific

Company, a copy of which is attached hereto marked Exhibit "Y", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Denver, Colorado; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Piers, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., [fol. 44] Inc. at Manhattan Piers, New Jersey, on the 17th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $579.03.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $579.03 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $579.03 is now due, owing and unpaid from the

defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 17th day of November, 1932.

[fol. 45] And for a nineteenth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation steam railroad lines as a common carrier.

IV

That on or about the 7th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 16444 consigned to defendant at Omaha, Nebraska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit "Z", hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. [fol. 46] at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its

connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 18th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII.

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $671.53.

VIII

That on the 25th day of October, 1935; the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

[fol. 47] That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $671.53 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $671.53 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 18th day of November, 1932.

And for a twentieth cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 8th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 32461 consigned to defendant at Omaha, Ne- [fol. 48] braska, to be shipped over the railroad lines of the Southern Pacific Company pursuant to the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit No. 1, hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Council Bluffs, Iowa; that thereafter said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 18th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the [fol. 49] Inter-State Commerce Act is the sum of $682.43.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $682.43 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the said sum of $682.43 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 18th day of November, 1932.

And for a twenty-first cause of action against the defendant, plaintiff alleges:

I

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the business of operating steam railroad lines as a common carrier.

II

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California.

[fol. 50]

III

That the Southern Pacific Company is a corporation operating steam railroad lines as a common carrier.

IV

That on or about the 26th day of October, 1932, the defendant, as consignor, delivered to the Southern Pacific Company at Quality, California, a carload of grapes loaded in car PFE 16386 consigned to defendant at Manhattan Produce Yards, New Jersey, to be shipped over the railroad lines of the Southern Pacific Company pursuant to

the provisions of a uniform bill of lading executed by defendant and the Southern Pacific Company, a copy of which is attached hereto marked Exhibit No. 2, hereby referred to and made a part hereof for all purposes.

V

That thereafter upon the order of defendant said carload of grapes was diverted to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey.

VI

That said carload of grapes was transported over the steam railroad lines of the Southern Pacific Company, its connecting carriers and the railroad lines of the plaintiff and was delivered by the plaintiff to Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, on the 9th day of November, 1932, and that the plaintiff, the Southern Pacific Company, and its connecting carriers performed each and all of the terms and conditions of the said bill of lading on the part of the carriers to be kept and performed.

[fol. 51]

VII

That the lawful freight, refrigeration, demurrage and other charges for the transportation, handling and delivery of said carload of grapes as herein alleged in accordance with the tariffs published and filed with the Inter-State Commerce Commission pursuant to the provisions of the Inter-State Commerce Act is the sum of $619.63.

VIII

That on the 25th day of October, 1935, the defendant executed and delivered to the plaintiff a waiver of the statute of limitations, a copy of which is attached hereto marked Exhibit "C", hereby referred to and made a part hereof for all purposes.

IX

That on or about the 26th day of December, 1935, in accordance with the provisions of the Inter-State Commerce Act plaintiff demanded payment of said sum of $619.63 from the defendant and the defendant definitely refused to pay said sum or any part thereof and that the

said sum of $619.63 is now due, owing and unpaid from the defendant to the plaintiff together with interest thereon at the rate of 7% per annum from the 9th day of November, 1932.

Wherefore, plaintiff prays judgment against the defendant for the sum of $13,678.86 together with interest on the sum of $1,388.06 at the rate of 7% per annum from the 28th day of October, 1932; interest on the sum of $2,564.02 from the 1st day of November, 1932, at the rate of 7% per annum; interest on the sum of $617.58 from [fol. 52] the 2nd day of November, 1932, at the rate of 7% per annum; interest on the sum of $619.63 from the 9th day of November, 1932, at the rate of 7% per annum; interest on the sum of $579.03 from the 17th day of November, 1932, at the rate of 7% per annum; interest on the sum of $5,374.94 from the 18th day of November, 1932, at the rate of 7% per annum; interest on the sum of $695.51 from the 19th day of November, 1932, at the rate of 7% per annum; interest on the sum of $1,250.76 from the 21st day of November, 1932, at the rate of 7% per annum; interest on the sum of $589.38 from the 22nd day of November, 1932, at the rate of 7% per annum; and for plaintiff's costs of suit.

W. H. Stammer, Attorney for Plaintiff.

[fol. 53] [File endorsement omitted.]

Duly sworn to by W. H. Stammer. Jurat omitted in printing.

(Here follows 2 photolithographs, side folios 53a-53b)

EXHIBIT "A" to amended complaint

58-A

The Atchison, Topeka and Santa Fe Railway Company

COAST LINES

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order.

At Conejo Calif Oct 7th 193[illegible]

From MID STATE HORTICULTURAL CO., Inc.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to Mid state Horticultural Co Inc (Mail or street address of consignee—For purposes of notification only.)

Destination Kansas City State of Mo County of

Route Belen A T & S F

Delivering Carrier Car Initial DFRD Car No. 174094

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	Class or Rate	Check Column
582	Cases Lettuce Iceberg			
	Brand Jumbo Trophy 12	29106		
	Less Minimum Car Loaded			
	2% Salt First & Second Quality Lettuce only No salt with mutilated celery			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

MID STATE HORTICULTURAL CO., Inc

(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

(Agent or Cashier)

Per (The signature here acknowledged only the amount prepaid.)

CAR ORDERED 10/6 3P

CAR PLACED 10/7 7A

CAR LOADED 10/7 8P

CAR RELEASED 10/7 9P

PRE-ICED

S. L. & C.

Charges Guaranteed—Bonds Filed

CAR UNDER ICE
STD. REFRIGERATION

This is to certify that the articles herein mentioned are packed in STANDARD RAILROAD CONTAINERS, Loaded, Braced, and Sealed in Car as required.

MID STATE HORTICULTURAL CO., Inc.

Signature.

Consigned to Mid State Horticultural Co Inc (Mail or street address of consignee—For purposes of notification only.)

Destination Kansas City State of Mo County of

Route Salina A T & S F

Delivering Carrier Car Initial DTRD Car No. 174094

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	Class or Rate	Check Column
882	Load Los Angeles Sugar Almonds			
	Blank Junk Property	29106		
	No Necessary Car Found			
	270 Salt First & Second Decks Only No salt with mixed Loading	S. L. & C.		

Charges Guaranteed—Bonds Filed

CAR UNDER ICE
STD. REFRIGERATION

CAR ORDERED	10/6	AM
CAR PLACED	10/7	7a
CAR LOADED	10/11	8 P
CAR RELEASED	10/11	9 P
PRE-ICED		

This is to certify that the articles herein mentioned are packed in STANDARD RAILROAD CONTAINERS, Loaded, Braced, and Sealed in Car as required.

MID STATE HORTICULTURAL CO., Inc.
Signature.

Subject to Section 7 of conditions. If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

MID STATE HORTICULTURAL CO., Inc.
(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

(Agent or Cashier)

Per (The signature here acknowledged is not receipt.)

Charges advanced:

$

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

MID STATE HORTICULTURAL CO., Inc. Shipper.

Per

Permanent post-office address of shipper

Agent or cashier not to sign this Shipping Order and must sign the Original Bill of Lading.

EXHIBIT "A"

CONTRACT TERMS AND CONDITIONS

[fol. 53c] EXHIBIT "B" TO AMENDED COMPLAINT

Jerome Distributing Co., Inc.
66 Harrison Street
New York, N. Y.

Notice No. 2214

Nov. 19, 19—.

Special Notice to Penn, (Name of Railroad) at Man Prod Yds Kearney NJ (Destination)

Please take notice that as to Car RD 17404

containing grapes { Shipped / diverted / reconsigned } 10/7/32 (Date)

from Calif. (Point of origin, diversion or reconsignment) to us, we are agents only and have no beneficial title in the property contained in car.

(The following additional information must be given in connection with cars diverted or reconsigned.)

The beneficial owner of the property is Midstate Hort. Co. Inc. (Name)

Fresno Calif.
(Address of beneficial owner)

This notice is given pursuant to the provisions of amended paragraph (2) of section 3 of the Interstate Commerce Act, effective March 4th, 1927.

Jerome Distributing Co., Inc., By B. Cutilelbery.

Pennsylvania Railroad Produce Terminal Nov 21 8 33 AM 32 Piers 27-28-29 New York City (Stamped.)

[fol. 53-d] EXHIBIT "C" TO AMENDED COMPLAINT

The Mid-State Horticultural Company, Inc., a Corporation of the State of California, hereby agrees that:

Whereas, The Pennsylvania Railroad Company is urging against the said Mid State Horticultural Company, Inc. a claim for the proper and lawful transportation charges, aggregating (subject to correction) $13,678.86, on twenty-one shipments of grapes made by the said Mid State Horticul-

tural Company, Inc. from points in California during the month of October, 1932, which were moved to New York City or vicinity, and there delivered to the Jerome Distributing Company, Inc. during the month of November, 1932, which shipments, identified by car number, and the amount due on each thereof, are as follows:

PFE 36495	$687.73	PFE 71402	$682.63
PFE 24375	683.83	PFE 35599	638.33
PFE 1478	660.43	PFE 28824	667.33
PFE 71971	589.38	PFE 71097	583.38
PFE 36105	689.73	PFE 14118	579.03
PFE 14745	662.83	PFE 16444	671.53
PFE 13607	670.33	PFE 32461	682.43
PFE 15847	658.13	PFE 16386	619.63
SFRD17404	695.51	SFRD18007	621.58
SFRD22471	698.33	PFE 13520	617.58
			$13,678.86

And whereas The Pennsylvania Railroad Company proposes to bring suit against the said Mid State Horticultural Company, Inc. looking toward the recovery and collection of such charges on October 28, 1935:

And whereas the said Mid State Horticultural Company, Inc. desires additional time for investigation and consideration of said claim, and thus requests The Pennsylvania Railroad Company to withhold the institution of any such [fol. 53-e] action until January 1, 1936:

And whereas the Pennsylvania Railroad Company is willing, in the hope that the said Mid State Horticultural Company may conclude to pay said claim without the necessity of litigation, to defer the institution of suit thereon until January 1, 1936, or until such earlier date as the said Mid State Horticultural Company may definitely refuse to pay said claim, the understanding being that The Pennsylvania Railroad Company may then institute such a suit within a reasonable time, not exceeding one month, after January 1, 1936, or after the date of such refusal to pay.

Now, therefore, in consideration of the forebearance of The Pennsylvania Railroad Company to bring such a suit against the Mid State Horticultural Company, Inc. prior to October 28, 1935, the said Mid State Horticultural Company, Inc. hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an

action, it, the said Mid State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.

This agreement is not an admission of the alleged debt by the Mid State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid State Horticultural Company, Inc. may have to said claim.

Dated at Philadelphia, Pa. this 25th day of October, 1935.

[fol. 53-f] Mid State Horticultural Company, Inc.
By (S) A. Setrakian, Vice-President.

[fol. 54] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

DEMURRER TO FIRST AMENDED COMPLAINT—Filed August 18, 1936

Comes now the above named defendant and demurring to plaintiff's first amended complaint on file herein alleges:

I

That said first amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

II

That the above entitled court has no jurisdiction of the person of the defendant.

III

That the above entitled court has no jurisdiction of the subject of the alleged causes of action therein contained.

IV

That as to the first cause of action therein contained:

(a) Said first cause of action does not state facts sufficient [fol. 55] to constitute a cause of action against this defendant.

(b) That said first cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

V

That as to the second cause of action therein contained:

(a) Said second cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said second cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

VI

That as to the third cause of action therein contained;

(a) Said third cause of action does not state facts sufficient to constitute a cause of action against this defendant.

[fol. 56] (b) That said third cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

VII

That as to the fourth cause of action therein contained:

(a) Said fourth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said fourth cause of action does not state facts sufficient to constitute a cause of action, in that it appears

on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

VIII

That as to the fifth cause of action therein contained:

(a) Said fifth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said fifth cause of action does not state facts [fol. 57] sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

IX

That as to the sixth cause of action therein contained:

(a) Said sixth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) Said sixth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

X

That as to the seventh cause of action therein contained:

(a) Said seventh cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said seventh cause of action does not state facts sufficient to constitute a cause of action, in that it appears [fol. 58] on the face thereof that the same is barred by the

provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XI

That as to the eighth cause of action therein contained:

(a) Said eighth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said eighth cause of action does not state facts sufficient to constitute a cause of action, in that appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XII

That as to the ninth cause of action therein contained.

(a) Said ninth cause of cation does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said ninth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions [fol. 59] of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XIII

That as to the tenth cause of action therein contained:

(a) Said tenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said tenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commeree Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XIV

That as to the eleventh cause of action therein contained:

(a) Said eleventh cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said eleventh cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act, [fol. 60] as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XV

That as to the twelfth cause of action therein contained:

(a) Said twelfth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said twelfth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XVI

That as to the thirteenth cause of action therein contained:

(a) Said thirteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said thirteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

[fol. 61] (c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XVII

That as to the fourteenth cause of action therein contained:

(a) Said fourteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said fourteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XVIII

That as to the fifteenth cause of action therein contained:

(a) Said fifteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant:

(b) That said fifteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of [fol. 62] the subject of the alleged cause of action.

XIX

That as to the sixteenth cause of action therein contained:

(a) Said sixteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said sixteenth cause of action does not state facts sufficient to constitute a cause of action in that it appears on the face thereof that the same is barred by the

provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XX

That as to the seventeenth cause of action therein contained:

(a) Said seventeenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said seventeenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

[fol. 63]

XXI

That as to the eighteenth cause of action therein contained:

(a) Said eighteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said eighteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XXII

That as to the nineteenth cause of action therein contained:

(a) That said nineteenth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said nineteenth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XXIII

[fol. 64] That as to the twentieth cause of action therein contained:

(a) Said twentieth cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said twentieth cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

XXIV

That as to the twenty-first cause of action therein contained:

(a) Said twenty-first cause of action does not state facts sufficient to constitute a cause of action against this defendant.

(b) That said twenty-first cause of action does not state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of Paragraph 3, Section 16 of the Interstate Commerce Act as amended.

(c) That the above entitled court has no jurisdiction of the subject of the alleged cause of action.

Wherefore, defendant prays that this demurrer be sustained, without leave to amend, and that the defendant be [fol. 65] dismissed with its costs of suit.

Edward L. Kellas, Attorney for Defendant.

Authorities in Support of the Foregoing Demurrer

Section 430 Code of Civil Procedure of the State of California.
Interstate Commerce Act, Paragraph 3, Section 16.
Interstate Commerce Act, Paragraph 2, Section 3.
Phillips v. Grand Trunk Railway, 236 U. S. 662-666.
Galveston H. & S. A. Railway Company v. Webster Company, 27 Fed. (2nd) 765 at 766.

Received copy of the within Demurrer this 18 day of August, 1936.

W. H. Stammer, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 66] In Superior Court of the State of California in and for the County of Fresno

[Title omitted]

Order Overruling Demurrer—Filed Oct. 2, 1936

It is ordered that the demurrer of the Defendant to the first amended complaint and to each cause of action thereof to the Complaint of the Plaintiff be and it is hereby overruled, and said Defendant to answer within 10 days.

[fol. 67] In Superior Court of the State of California in and for the County of Fresno

[Title omitted]

Notice of Association of Counsel for Defendant—Filed Jan. 27, 1940

To the Plaintiff above named, and to *W. H. Stammer, Esq.*, its attorney:

You and each of you will please take notice that the above named defendant this date has associated the law firm of *Sullivan, Roche & Johnson*, with offices in the Mills Tower, San Francisco, California, with the undersigned as attorneys for the defendant in the above entitled action.

Dated: this 25th day of January, 1940.

Edward L. Kellas, *Attorney for Defendant.*

Receipt of copy of the foregoing notice is admitted this 27 day of January, 1940.

W. H. Stammer, *Attorney for Plaintiff.*

[File endorsement omitted.]

[fol. 68] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO FILE AMENDED ANSWER—Filed February 10, 1941

To the Plaintiff in the Above Entitled Action and to W. H. Stammer, Esq., Its Attorney:

GENTLEMEN:

You and each of you will please take notice that on Thursday, the 13th day of February, 1941, at 9:30 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the defendant in the above entitled action will move the above entitled court, Department 3 thereof, situated in the court house, City of Fresno, County of Fresno, State of California, for an order permitting said defendant to file an amended answer to plaintiff's amended complaint on file herein, a copy of which proposed amended answer [fol. 69] is attached hereto and marked Exhibit "A".

Said motion will be made upon the following grounds, and each of them, to-wit:

1. That the granting of said order permitting said amended answer to said amended complaint will be in furtherance of justice.

2. That the filing of said amended answer, if permitted, will simplify the issues in said action to be determined by the above entitled court upon the trial thereof.

3. That said proposed amended answer is substantially in accord with the answer of said defendant to plaintiff's amended complaint on file herein, excepting that said amended answer more specifically and in greater detail sets forth the facts upon which the defense of estoppel pleaded in defendant's answer to plaintiff's amended complaint is based.

4. That said proposed amended answer neither tenders nor raises any issues of fact that are not already included in defendant's answer to plaintiff's amended complaint.

5. That said plaintiff can sustain no prejudice by reason of the filing of said proposed amended answer to plaintiff's amended complaint.

6. That the trial of said action will not be delayed by the filing of said proposed amended answer to plaintiff's said amended complaint.

Said motion will be based upon this notice of motion; [fol. 70] upon said proposed amended answer to plaintiff's amended complaint, upon defendant's original answer to plaintiff's amended complaint and upon all of the records, files and proceedings in the above entitled action.

Dated: February 10, 1941.

Kellas & Lamberson, Sullivan, Roche & Johnson,
Attorneys for Defendant.

AUTHORITIES IN SUPPORT OF MOTION

Section 473, Code of Civil Procedure.
Abbott v. *Limited Mutual Compensation Insurance Co.*, 30 Cal. App. (2d) 157
Bank of America etc. v. *Goldstein*, 25 Cal. App. (2d) 37
Hess v. *Moody*, 35 Cal. App. (2d) 401
Jenssen v. *R. K. O. Studios Inc.*, 20 Cal. App. (2d) 705

Kellas & Lamberson, Sullivan, Roche & Johnson,
Attorneys for Defendant.

[File endorsement omitted.]

[fol. 71] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

ORDER GRANTING MOTION TO FILE AMENDED ANSWER—February 13, 1941

The motion is argued by respective counsel, W. H. Stammer for Plaintiff, and Theodore Roche, for Defendant, and by the Court said motion is granted.

[fol. 72] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

AMENDED ANSWER TO AMENDED COMPLAINT—Filed February 13, 1941

Now comes the defendant in the above entitled action and for answer to the first count or cause of action contained in plaintiff's amended complaint, admits, denies and alleges as follows:

Admits all of the allegations contained in Paragraphs I, II, III, IV, V and VIII thereof.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI thereof.

Answering the allegations of Paragraph VII thereof defendant admits that it was the beneficial owner of said [fol. 73] carload of grapes, and that said Jerome Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $695.51, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 19th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Second count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

[fol. 74] Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Second count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Second count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said second count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome

Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

[fol. 75] Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $698.33, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 28th day of October, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Third count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Third count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Third count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said Third count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name,

and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before [fol. 76] accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $617.58, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 2nd day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Fourth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Fourth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of [fol. 77] Paragraph VI of said Fourth count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said Fourth count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $619.18, with interest thereon at the rate of seven per cent per annum, or any other per cent, from the 1st day of No- [fol. 78] vember, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Fifth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Fifth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Fifth count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said Fifth count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a

[fol. 79] copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $621.58, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 1st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Sixth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VIII of said Sixth Count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Sixth count contained in plaintiff's amended complaint.

Answering the allegations of Paragraph VII of said Sixth count or cause of action contained in plaintiff's amended complaint, defendant admits that it was the beneficial owner of said carload of grapes, and that said Jerome [fol. 80] Distributing Co., Inc., was the agent of said defendant, but alleges the fact to be that said Jerome Distributing Co., Inc., was a factor with the authority to accept, receive, handle or deal with said carload of grapes in its own name, and charged with the duty of paying all freight charges attendant to the shipment of said carload of grapes before accepting delivery thereof from the plaintiff carrier, all of which was known to said plaintiff.

Answering Paragraph IX thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver

of the statute of limitations, and alleges that no valuable consideration passed from the plaintiff to the defendant for the execution and delivery thereof; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph X thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $667.33, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 21st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph X contained.

As and for its answer to the Seventh count or cause [fol. 81] of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Seventh count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Seventh count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $687.73, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Eighth count or cause of action contained in plaintiff's amended complaint, said [fol. 82] defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Eighth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Eighth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $683.83, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Ninth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

[fol. 83] Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Ninth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Ninth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $660.43, with interest thereon at the rate of seven per cent per annum, or any percent, from the 1st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Tenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and [fol. 84] VII of said Tenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Tenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $589.38, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 22nd day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Eleventh count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Eleventh count contained in said plaintiff's [fol. 85] amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Eleventh count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $689.73, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 28th day of October, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Twelfth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Twelfth count contained in said plaintiff's amended complaint.

[fol. 86] Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Twelfth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25 day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $662.83, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 1st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Thirteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Thirteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise [fol. 87] alleged, said defendant admits the allegations of Paragraph VI of said Thirteenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and plaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $670.33, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Fourteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Fourteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph [fol. 88] VI of said Fourteenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of

limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $653.18, with interest thereon at the rate of seven per cent per annum, or any percent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Fifteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Fifteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Fifteenth count contained in plaintiff's amended [fol. 89] complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $682.63, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Sixteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Sixteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Sixteenth count contained in plaintiff's amended complaint.

[fol. 90] Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $638.33, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Seventeenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Seventeenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Seventeenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant ad-
[fol. 91] mits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $583.38, with

interest thereon at the rate of seven per cent per annum, or any per cent, from the 21st day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Eighteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Eighteenth count contained in said plaintiff's amended Complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Eighteenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant [fol. 92] executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $579.03, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 17th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Nineteenth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Nineteenth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Nineteenth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing,

[fol. 93] a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $671.53, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Twentieth count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Twentieth count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Twentieth count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and [fol. 94] marked Exhibit "C" in said amended complaint, but denies that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $682.43 with interest thereon at the rate of seven per cent per annum, or any per cent, from the 18th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

As and for its answer to the Twenty-First count or cause of action contained in plaintiff's amended complaint, said defendant admits, denies and alleges as follows:

Admits the allegations of Paragraphs I, II, III, IV, V and VII of said Twenty-First count contained in said plaintiff's amended complaint.

Except as in this answer specifically denied, or otherwise alleged, said defendant admits the allegations of Paragraph VI of said Twenty-First count contained in plaintiff's amended complaint.

Answering Paragraph VIII thereof, said defendant admits that on the 25th day of October, 1935, said defendant executed and delivered to the plaintiff a certain writing, a copy of which is attached to said amended complaint and marked Exhibit "C" in said amended complaint, but denies [fol. 95] that such writing constitutes a waiver of the statute of limitations; and further alleges that said instrument is contrary to the laws and statutes of the United States of America, and is void, and of no force or effect.

Answering the allegations of Paragraph IX thereof, said defendant denies that there is now due, or owing or unpaid from the defendant to the plaintiff the sum of $619.63, with interest thereon at the rate of seven per cent per annum, or any per cent, from the 9th day of November, 1932, or from any other date, or any sum whatsoever; but admits the other allegations of said Paragraph IX contained.

And as a further, separate and affirmative defense to plaintiff's amended complaint and to each and every of the counts and causes of action therein contained, said defendant alleges:

That said amended complaint does not, nor does any of the counts or causes of action therein contained, state facts sufficient to constitute a cause of action, or any cause of action, against this defendant.

And as a further, separate and second affirmative defense to plaintiff's amended complaint and to each and every of the counts and causes of action therein set forth, said defendant alleges:

That said amended complaint, and each and every of the counts or causes of action therein contained, is barred by the provisions of Paragraph 3, section 16, of the Interstate Commerce Act of the United States of America as amended [fol. 96] (U. S. C. A., Title 49, sec. 16, par. 3).

And as a further, separate and third affirmative defense to plaintiff's amended complaint and to each and every of the counts or causes of action therein contained, said defendant alleges:

That the above entitled court has no jurisdiction of the subject-matter of the alleged causes of action, or any of them, set forth in plaintiff's amended complaint, or in any count thereof.

And as a further, separate and Fourth affirmative defense to plaintiff's amended complaint and to each and every count or cause of action therein contained, said defendant alleges:

That said plaintiff is estopped to assert any of the said alleged causes of action set forth in plaintiff's amended complaint, or in any count thereof, against this defendant, and that said estoppel is predicated upon the following facts:

I

After the issuance and delivery to defendant of each of said bills of lading referred to in each and all of the counts contained in plaintiff's amended complaint, each of said carloads of grapes was diverted to Jerome Distributing Co., Inc., as consignee, at Manhattan Produce Yards, New Jersey, excepting that said carloads of grapes referred to in Counts 10 and 17 of plaintiff's amended complaint were diverted to said Jerome Distributing Co., Inc. as consignee, at Piers 29 and 28 respectively at New York City, New York, [fol. 97] and said carload of grapes referred to in Count 13 of plaintiff's amended complaint was diverted to said Jerome Distributing Co., Inc. as consignee, at Manhattan Piers, New Jersey.

II

Upon and according to the information and belief of defendant, between and including October 28, 1932 and November 2, 1932, said plaintiff delivered to said Jerome Distributing Co., Inc., at Manhattan Produce Yards, New Jersey, each of said carloads of grapes referred to and described in Counts 2, 3, 4, 5, 9, 11 and 12 of plaintiff's amended complaint, and said Jerome Distributing Co., Inc. paid to said plaintiff all lawful freight, refrigeration and

demurrage charges for the transportation, handling and delivery of said carloads of grapes, and each of them, in the amounts set forth in said Counts 2, 3, 4, 5, 9, 11 and 12 by issuing and delivering to said plaintiff its check dated November 19, 1932, in an amount in excess of said charges, which check was then and there received and accepted by plaintiff in payment, satisfaction and discharge, among others, of said charges hereinabove in this paragraph referred to. At or about the time said check was so received by said plaintiff, as aforesaid, said plaintiff receipted in full the freight bills presented to it by said Jerome Distributing Co., Inc. for said charges and acknowledged upon said freight bills the payment to it of all of said charges, and immediately thereafter delivered said freight bills so receipted by it to said Jerome Distributing Co., Inc. which thereupon delivered said freight bills to said defendant. [fol. 98] Upon and according to the information and belief of defendant, said check hereinabove in this paragraph referred to, when presented for payment to the bank upon which it was drawn, was not honored by said bank or paid, but said plaintiff elected to hold said check and rely upon the responsibility of said Jerome Distributing Co., Inc., said consignee, for payment of the charges referred to in said Counts 2, 3, 4, 5, 9, 11 and 12 of said amended complaint, and gave no notice to defendant that said charges had been paid by said check or of the dishonoring and nonpayment of said check by said bank until on or about the 2nd day of May, 1934.

III

Upon and according to the information and belief of defendant, between and including November 9, 1932 and November 18, 1932, said plaintiff delivered to said Jerome Distributing Co., Inc., at the places to which each of said carloads of grapes had been diverted as aforesaid each of said carloads of grapes referred to and described in Counts 7, 8, 13, 14, 15, 16, 18, 20 and 21 of plaintiff's amended complaint, and said Jerome Distributing Co., Inc., paid to said plaintiff all lawful freight, refrigeration and demurrage charges for the transportation, handling and delivery of said carloads of grapes, and each of them, in the amounts set forth in said Counts 7, 8, 13, 14, 15, 16, 18, 20 and 21, excepting a balance of $2.00 due as charges on said carload of grapes referred to in Count 14 of plaintiff's amended complaint and excepting that included in said

[fol. 99] check was the sum of $2.00 paid by said Jerome Distributing Co., Inc. on account of charges thereafter payable to plaintiff upon the carload of grapes referred to in Count 19 of plaintiff's amended complaint, to which charges reference is hereafter and in Paragraph IV of this further, separate and fourth affirmative defense to plaintiff's amended complaint, made, by issuing and delivery to said plaintiff its check dated November 21, 1932, in an amount in excess of said charges, which check was then and there received and accepted by plaintiff in payment, satisfaction and discharge, among others, of said charges hereinabove in this paragraph referred to. At or about the time said check was so received by said plaintiff, as aforesaid, said plaintiff receipted in full the freight bills presented by it to said Jerome Distributing Co., Inc. for said charges and acknowledged upon said freight bills the payment to it of all of said charges, and immediately thereafter delivered said freight bills so receipted by it to Jerome Distributing Co., Inc. which thereupon delivered said freight bills to said defendant. Said balance of $2.00 due as charges on said carload of grapes referred to in Count 14 of plaintiff's amended complaint was paid by check dated November 22, 1932, referred to in Paragraph IV of this further, separate and fourth affirmative defense to said amended complaint.

Upon and according to the information and belief of defendant, said check hereinabove in this paragraph referred to, when presented for payment to the bank upon which it was drawn was not honored by said bank or paid, [fol. 100] but said plaintiff elected to hold said check and rely upon the responsibility of said Jerome Distributing Co., Inc., said consignee, for payment of the charges referred to in said Counts 7, 8, 13, 14, 15, 16, 18, 20 and 21 of said amended complaint, and gave no notice to defendant that said charges had been paid by said check or of the dishonoring and nonpayment of said check by said bank until on or about the 2d day of May, 1934.

IV

Upon and according to the information and belief of defendant, between and including November 18, 1932 and November 22, 1932, said plaintiff delivered to said Jerome Distributing Co., Inc., at the places to which each of said

carloads of grapes had been diverted as aforesaid each of said carloads of grapes referred to and described in Counts 1, 6, 10, 17 and 19 of plaintiff's amended complaint, and said Jerome Distributing Co., Inc. paid to said plaintiff all lawful freight, refrigeration and demurrage charges for the transportation, handling and delivery of said carloads of grapes, and each of them, in the amounts set forth in said Counts 1, 6, 10, 17 and 19 and the balance of said charges due upon said carload of grapes referred to in Count 19 of plaintiff's amended complaint, by issuing and delivering to said plaintiff its check dated November 22, 1932, in an amount in excess of said charges, which check was then and there received and accepted by plaintiff in payment, satisfaction and discharge, among others, of said charges hereinabove in this paragraph referred to. At or [fol. 101] about the time said check was so received by said plaintiff, as aforesaid, said plaintiff receipted in full the freight bills presented by it to said Jerome Distributing Co., Inc. for said charges and acknowledged upon said freight bills the payment to it of all of said charges, and immediately thereafter delivered said freight bills so receipted by it to Jerome Distributing Co., Inc. which thereupon delivered said freight bills—said defendant.

Upon and according to the information and belief of defendant, said check hereinabove in this paragraph referred to, when presented for payment to the bank upon which it was drawn, was not honored by said bank or paid, but said plaintiff elected to hold said check and rely upon the responsibility of said Jerome Distributing Co., Inc., said consignee, for payment of the charges referred to in said Counts 1, 6, 10, 17 and 19.

V

At no time prior to the month of May, 1933, was defendant informed that any of said freight, refrigeration and demurrage charges referred to in plaintiff's amended complaint, for the transportation, handling and delivery of said carloads of grapes had not been paid by said Jerome Distributing Co., Inc. At no time prior to the 26th day of June, 1933, did defendant know or had it been informed, that said charges, or any of them, had been paid by said Jerome Distributing Co., Inc. by said checks, or that any of said checks presented for payment to the bank upon which they were drawn had not been honored or paid by said bank.

[fol. 102]

VI

During the grape season of the year 1932 said defendant was engaged in the business, among others, of shipping and consigning to Jerome Distributing Co., Inc. a number of carloads of grapes to be sold and disposed of by said Jerome Distributing Co., Inc. for the account of said defendant upon the understanding and agreement theretofore entered into between said Jerome Distributing Co., Inc. and said defendant that said Jerome Distributing Co., Inc., upon receipt of and delivery to it of each of said carloads of grapes, would pay all lawful freight, refrigeration and demurrage charges for the transportation, handling and delivery of each of said carloads of grapes, all of which at all of said times was known to said plaintiff.

VII

Pursuant to said agreement between said defendant and said Jerome Distributing Co., Inc. and prior to the 28th day of October, 1932, said defendant had shipped and diverted to said Jerome Distributing Co., Inc. at Manhattan Produce Yards, New Jersey, a number of carloads of grapes, which carloads of grapes were transported over the steam railroad lines of plaintiff and connecting lines, and, prior to said 28th day of October, 1932, were delivered by plaintiff to said Jerome Distributing Co., Inc. at said Manhattan Produce Yards, New Jersey, the point to which said carloads of grapes were diverted.

VIII

[fol. 103] Upon and according to the information and belief of defendant, at or about the time of the delivery of each of said carloads of grapes mentioned and referred to in Paragraph VII of this further, separate and fourth affirmative defense by said plaintiff to said Jerome Distributing Co., Inc. at said Manhattan Produce Yards, New Jersey, all freight, refrigeration and demurrage charges for the transportation, handling and delivery of each of said carloads of grapes were paid by said Jerome Distributing Co., Inc., to said plaintiff as herein above set forth. Thereupon said plaintiff receipted its freight bills for said charges and acknowledged payment to it of all of said charges and acknowledged payment to it of all of said

charges, and thereafter delivered each of said freight bills so receipted by it to said Jerome Distributing Co., Inc. which thereupon delivered said freight bills so receipted as aforesaid to said defendant.

IX

At no time prior to May, 1933, did said plaintiff, or said bank, or said Jerome Distributing Co., Inc., or anyone else, notify or advise defendant that said freight, refrigeration and demurrage charges for the transportation, handling and delivery of any of said carloads of grapes set forth in each and every count of said amended complaint had not been paid, or that any of said checks issued by said Jerome Distributing Co., Inc. to plaintiff had been dishonored or had not been paid, and at all times prior to said May, 1933, said defendant believed that all of said charges had been paid by said Jerome Distributing Co., Inc. and that no part thereof had remained unpaid.

[fol. 104]

X

The first of said carloads of grapes referred to in plaintiff's amended complaint so delivered by said plaintiff to said Jerome Distributing Co., Inc. were and are said carloads of grapes referred to and described in Counts 2 and 11 of plaintiff's amended complaint, which carloads of grapes were delivered by said plaintiff to said Jerome Distributing Co., Inc. on or about the 28th day of October, 1932.

Between said 28th day of October, 1932, and to and including the 22nd day of November, 1932, in the belief that all of said charges due and payable upon said carloads of grapes mentioned in Counts 2 and 11 of plaintiff's amended complaint had been paid, and in the belief that all of said charges for transportation, handling and delivery of those carloads of grapes which were thereafter delivered by said plaintiff to said Jerome Distributing Co., Inc., were being paid by said Jerome Distributing Co., Inc. when each of said carloads of grapes was so delivered, said defendant continued to direct the delivery to said Jerome Distributing Co., Inc. at said places to which said carloads of grapes had been diverted as aforesaid, being and constituting the carloads of grapes referred to in plaintiff's amended com-

plaint, and in each count thereof, other than and excepting said Counts 2 and 11.

XI

If defendant had been notified or advised or had known that said Jerome Distributing Co., Inc., was not paying said charges as aforesaid, upon the delivery to and receipt [fol. 105] by it of any of said carloads of grapes, after the said carloads of grapes referred to and described in Counts 2 and 11 of plaintiff's amended complaint, said defendant would have immediately stopped and prevented the delivery of any further carloads of grapes to said Jerome Distributing Co., Inc. until and unless said charges upon each and every carload of grapes referred to and described in each and every of the remaining counts of said amended complaint had been paid in full by said Jerome Distributing Co., Inc. and defendant would have taken immediate proceedings to enforce the payment by said Jerome Distributing Co., Inc. of said charges upon each of said carloads of grapes mentioned and described in said Counts 2 and 11 of said amended complaint.

XII

After the acceptance of said check referred to in Paragraph II of this further, separate and fourth affirmative defense to plaintiff's amended complaint and the dishonoring thereof by said bank upon which said check was drawn and the refusal of said bank to pay said check, said plaintiff continued to deliver to said Jerome Distributing Co., Inc. all of said carloads of grapes so shipped and consigned, or shipped and diverted, to it by said defendant and referred to in plaintiff's amended complaint excepting in Counts 2 and 11 thereof, and during said period of time continued to accept, in payment of the charges upon said carloads of grapes, said checks of said Jerome Distributing Co., Inc. hereinabove in Paragraphs II, III and IV of this further, separate and fourth affirmative defense to said amended [fol. 106] complaint, and each and every count thereof, and upon the said delivery of each of said carloads of grapes said plaintiff receipted the freight bill therefor and acknowledged the payment to it of all of said charges, and immediately thereafter delivered each of said freight bills

so receipted to said Jerome Distributing Co., Inc. which thereupon delivered to said defendant said freight bills so receipted as aforesaid.

XIII

Thereafter and on or about the 20th day of December, 1932, defendant finally settled its account with said Jerome Distributing Co., Inc. involving the receipt by it and sale and disposition of all of said carloads of grapes and in the belief that all of said transportation charges had been paid in full by said Jerome Distributing Co., Inc. to said plaintiff, and having no knowledge or information that said charges had not been paid in full, in settlement of said accounts, said defendant gave credit to and said Jerome Distributing Co., Inc. received credit from said defendant for the payment of all of said transportation charges as aforesaid.

Upon said settlement the sum of $790.00 became due from said defendant to said Jerome Distributing Co., Inc., which sum has never been paid to said Jerome Distributing Co., Inc., but is still in possession of defendant.

XIV

At all of said times and until May, 1933, said plaintiff withheld from defendant any information respecting the non-payment of said charges aforesaid by said Jerome [fol. 107] Distributing Co., Inc. and said defendant, relying upon the statement of said Jerome Distributing Co., Inc. that said charges had been paid, and the receipt by it of said freight bills upon which said plaintiff had endorsed its receipt of all of said charges, and having no information that said charges had not been paid, during December, 1933, made said settlement with said Jerome Distributing Co., Inc. as aforesaid.

XV

Prior to the month of May, 1933, said defendant did not know and had not been informed either by said plaintiff or any other person or corporation, that said plaintiff was claiming that any of said lawful freight, refrigeration and demurrage charges for the transportation, handling and delivery of said carloads of grapes had not been paid, or that said defendant was liable therefor, or any part thereof,

or that it had any claim against said defendant for said charges or any part thereof.

XVI

After the close of said shipping season of 1932 and prior to May, 1933, said defendant made certain claims for damages against said plaintiff based upon the negligence of said plaintiff and its connecting carriers in transporting goods and merchandise for defendant over the lines of said plaintiff and its connecting carriers, which claims were received, acted upon and in some instances paid without any claim being made by said plaintiff against said defendant for said transportation charges, or any part thereof, referred to in plaintiff's amended complaint.

[fol. 108]

XVII

Upon and according to the information and belief of defendant, prior to the time said defendant was informed that any of said transportation charges had not been paid by said Jerome Distributing Co., Inc., or that said plaintiff was asserting any liability against said defendant for said charges, or any part thereof, said Jerome Distributing Co., Inc. had become insolvent, and thereafter said defendant was precluded from recovering and could not recover said transportation charges, or any part thereof, from said Jerome Distributing Co., Inc. excepting said sum of $790.00.

XVIII

If, at or about said 28th day of October, 1932, said defendant had been advised by said plaintiff, or by any other person, that said Jerome Distributing Co., Inc. had not paid said lawful freight, refrigeration and demurrage charges upon said carloads of grapes referred to and described in Counts 2 and 11 of said amended complaint, said defendant would have refused to permit the delivery to said Jerome Distributing Co., Inc. of any additional carloads of grapes unless said charges had been paid in full and provision made for the payment upon delivery of all of said charges payable to plaintiff upon said carloads of grapes referred to in plaintiff's amended complaint which were thereafter delivered by said plaintiff to said Jerome Distributing Co., Inc.

Said settlement of said account of said Jerome Distribut-
[fol. 109] ing Co., Inc., would not have been made by said defendant if prior thereto said defendant had been advised and notified that said charges upon any of said carloads of grapes referred to and described in plaintiff's amended complaint, or any of the counts thereof, had not been paid by said Jerome Distributing Co., Inc,, or that said plaintiff was asserting or claiming that defendant was liable for said charges, or any part thereof.

XIX

By reason of the facts herein in this further, separate and fourth affirmative defense to plaintiff's amended complaint, said plaintiff should be and is estopped from making any claim against this defendant because of said freight, refrigeration and demurrage charges for the transportation, handling and delivery of any of said carloads of grapes described in plaintiff's amended complaint and in each and every of the counts therein contained, other than and excepting to the extent of said sum of $790.00.

And as a further, separate and Fifth affirmative defense to Counts 1, 2, 3, 4 and 5, and each of them, contained in plaintiff's amended complaint said defendant alleges:

I

At the time of the issuance and delivery to said defendant of each of said bills of lading referred to in Counts 1, 2, 3, 4 and 5 of plaintiff's amended complaint there was endorsed upon the face of each of said bills of lading a certain agreement signed by said defendant as consignor of the carload [fol. 110] of grapes referred to in each of said counts of said amended complaint, which agreement was and is in the words and figures following:

"Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

Mid-State Horticultural Co.
(Signature of Consignor.)"

Thereafter upon the order of said defendant, each of said carloads of grapes referred to in said Counts 1, 2, 3, 4 and 5 of plaintiff's amended complaint was diverted to Jerome Distributing Co., Inc. a corporation, as consignee, at Manhattan Produce Yards, New Jersey, and was thereafter delivered to said Jerome Distributing Co., Inc., by said plaintiff as alleged in said counts of said amended complaint.

Wherefore, defendant prays that plaintiff take nothing by its action and that it have and recover judgment for its costs of suit.

Dated: January 22nd, 1941.

Kellas & Lamberson, Sullivan, Roche & Johnson,
Attorneys for Defendant.

[fol. 111] [File endorsement omitted.]

Duly sworn to by Arpaxat Setrakian. Jurat omitted in printing.

[fol. 112] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

DEMURRER TO DEFENDANT'S AMENDED ANSWER TO AMENDED COMPLAINT—Filed February 14, 1941

Comes now the plaintiff and demurs to defendant's amended answer to the amended complaint upon the following grounds:

I

That the further, separate and fourth affirmative defense to each and every count in plaintiff's amended complaint does not state facts sufficient to constitute a defense to plaintiff's amended complaint or to any count or cause of action contained in plaintiff's amended complaint.

WHEREFORE, plaintiff prays that this demurrer be sustained as to said affirmative defense.

W. H. Stammer, Attorney for Plaintiff.

Due service of the foregoing Demurrer, by copy, this 14th day of February, 1941, is hereby admitted.

Kellas & Lamberson, Sullivan, Roche & Johnson, by Richard Z. Lamberson, Attorneys for Defendant.

[fol. 113] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S DEMURRER TO DEFENDANT'S AMENDED ANSWER TO AMENDED COMPLAINT—Filed February 14, 1941

Estoppel is not a defense to an action for the recovery of freight charges against a person liable therefor.

Pittsburg R.R. v. *Fink*, 250 U.S. 577, 63 L. ed. 1151.

New York Central R.R. v. *York Co.*, 256 U.S. 406.

Louisville Ry. Co. v. *Central Iron Co.*, 265 U.S. 59, 44 S.C. 441.

New York Central R.R. v. *Buck*, 2 Cal. (2d) 384.

Houston R.R. Co. v. *Johnson*, 41 S.W. (2d) 14.

New York Central R.R. v. *Philadelphia Coal Co.*, 121 N.E. 581.

Respectfully submitted,
W. H. Stammer, Attorney for Plaintiff.

Due service of the foregoing Points and Authorities, by copy, this 14th day of February, 1941, is hereby admitted.

[File endorsement omitted]

Kellas & Lamberson, Sullivan, Roche & Johnson, by Richard Z. Lamberson, Attorneys for Defendant.

[fol. 114] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

NOTICE OF MOTION TO STRIKE OUT PORTIONS OF DEFENDANT'S AMENDED ANSWER TO AMENDED COMPLAINT—

Filed February 14, 1941

To the Defendant above named and to KELLAS & LAMBERSON and SULLIVAN, ROCHE & JOHNSON, its attorneys:

You, and each of you, will please take notice that on Thursday, the 20th day of February, 1941, at the hour of 10:00 o'clock A.M. of said day, in the court-room of Depart-

ment Three of the above entitled Court, in the Court House in the City of Fresno, County of Fresno, State of California, plaintiff will move the above entitled Court for its order striking out of defendant's amended answer to plaintiff's amended complaint each and all of the following portions thereof, to-wit:

I

All of the further, separate and fourth affirmative defense to plaintiff's amended complaint appearing in said amended answer, commencing at line 28 on page 21 and ending on line 25 of page 32.

II

(1) All of paragraph I of the further, separate and [fol. 115] fourth affirmative defense, appearing at page 22 of said amended answer from lines 4 to 15.

(2) All of paragraph II of said further, separate and fourth affirmative defense, commencing at line 17 on page 22 of said amended answer and ending at line 18 on page 23.

(3) All of paragraph III of said further, separate and fourth affirmative defense, commencing at line 20 on page 23 of said amended answer and ending at line 2 on page 25.

(4) All of paragraph IV of said further, separate and fourth affirmative defense, commencing at line 4 on page 25 of said amended answer and ending at line 2 on page 26.

(5) All of paragraph V of said further, separate and fourth affirmative defense, commencing at line 4 on page 26 of said amended answer and ending at line 14 on said page 26.

(6) All of paragraph VI of said further, separate and fourth affirmative defense, appearing at page 26 of said amended answer from lines 16 to 27.

(7) All of paragraph VII of said further, separate and fourth affirmative defense, commencing at line 29 on page 26 of said amended answer and ending at line 6 on page 27.

(8) All of paragraph VIII of said further, separate and fourth affirmative defense, appearing at page 27 of said amended answer from lines 8 to 21.

(9) All of paragraph IX of said further, separate and fourth affirmative defense, commencing at line 23 on page 27 of said amended answer and ending at line 1 on page 28.

(10) All of paragraph X of said further, separate and [fol. 116] fourth affirmative defense, appearing at page 28 of said amended answer from lines 3 to 24.

(11) All of paragraph XI of said further, separate and fourth affirmative defense, commencing at line 26 on page 28 of said amended answer and ending at line 8 on page 29.

(12) All of paragraph XII of said further, separate and fourth affirmative defense, appearing at page 29 of said amended answer from lines 10 to 29.

(13) All of paragraph XIII of said further, separate and fourth affirmative defense, commencing at line 31 on page 29 of said amended answer and ending at line 13 on page 30.

(14) All of paragraph XIV of said further, separate and fourth affirmative defense, appearing at page 30 of said amended answer from lines 15 to 24.

(15) All of paragraph XV of said further, separate and fourth affirmative defense, commencing at line 26 on page 30 of said amended answer and ending at line 2 on page 31.

(16) All of paragraph XVI of said further, separate and fourth affirmative defense, appearing at page 31 of said amended answer from lines 4 to 13.

(17) All of paragraph XVII of said further, separate and fourth affirmative defense, appearing at page 31 of said amended answer from lines 15 to 24.

(18) All of paragraph XVIII of said further, separate and fourth affirmative defense, commencing at line 26 on page 31 of said amended answer and ending at line 14 on page 32.

(19) All of paragraph XIX of said further, separate [fol. 117] and fourth affirmative defense, appearing at page 32 of said amended answer from lines 17 to 25.

Said motion will be made upon the ground that each and all of said portions of said amended answer are sham and irrelevant and redundant.

Said motion will be based upon this notice of notion, the points and authorities filed in support thereof, and the records and files in the above entitled action.

Dated: February 14th, 1941.

W. H. Stammer, Attorney for Plaintiff.

Due service of the foregoing Notice, by copy, this 14th day of February, 1941, is hereby admitted.

Kellas & Lamberson, Sullivan, Roche & Johnson, by Richard Z. Lamberson, Attorneys for Defendant.

[fol. 118] In Superior Court of the State of California, in and for the County of Fresno.

[Title omitted]

Points and Authorities in Support of Motion to Strike Out Portions of Defendant's Amended Answer to Amended Complaint—Filed Feb. 14, 1941.

Sham and irrelevant answers, and irrelevant and redundant matter may be stricken from a pleading.

Code of Civil Procedure, Section 453.

Estoppel is not a defense to an action for the recovery of freight charges against a person liable therefor.

Pittsburg R. R. v. *Fink*, 250 U. S. 577, 63 L. ed. 1151.

New York Central R.R. v. *York Co.*, 256 U. S. 406.

Louisville Ry. Co. v. *Central Iron Co.*, 265 U. S. 59, 44 S. C. 441.

New York Central R.R. v. *Buck*, 2 Cal. (2d) 384.

Houston R.R. Co. v. *Johnson*, 41 S. W. (2d) 14.

New York Central R.R. v. *Philadelphia Coal Co.*, 121 N. E. 581.

Respectfully submitted,

W. H. Stammer, Attorney for Plaintiff.

[fol. 119] Due service of the foregoing Points and Authorities, by copy, this 14th day of February, 1941, is hereby admitted.

Kellas & Lamberson, Sullivan Roche & Johnson, by Richard Z. Lamberson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 120] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO.

[Title omitted]

ORDER ON DEMURRER AND MOTION TO STRIKE—Filed Feb. 20, 1941

It is ordered that the demurrer of the plaintiff to the fourth defense of the Amended Answer of the defendant be and it is hereby sustained and the Motion to Strike granted.

[fol. 121] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO.

[Title omitted]

FINDINGS OF FACT AND CONCLUSINS OF LAW—Filed May 14, 1941

The above entitled action came on regularly for trial on the 20th day of February, 1941, before the Court sitting without a jury, a jury having been waived, W. H. Stammer, Esq., and Galen McKnight, Esq., appearing as attorneys for the plaintiff and Theodore J. Roche, Esq., of Sullivan, Roche & Johnson and Edward L. Kellas, Esq., of Kellas & Lamberson appearing as attorneys for the defendant; and the evidence and proofs of the respective parties having been heard and duly considered; and the action having been submitted to the Court for its decision, the Court now finds the facts in this case to be as follows:

I

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the first cause of action in plaintiff's First Amended Complaint are true.

II

Each and all of the allegations in paragraphs I, II, III, [fol. 122] IV, V, VI, VII, VIII, IX and X of the second cause of action in plaintiff's First Amended Complaint are true.

III

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the third cause of action in plaintiff's First Amended Complaint are true.

IV

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the fourth cause of action in plaintiff's First Amended Complaint are true.

V

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the fifth cause of action in plaintiff's First Amended Complaint are true.

VI

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the sixth cause of action in plaintiff's First Amended Complaint are true.

VII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the seventh cause of action in plaintiff's First Amended Complaint are true.

VIII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the eighth cause of action in plaintiff's First Amended Complaint are true.

IX

[fol. 123] Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the ninth cause of action in plaintiff's First Amended Complaint are true.

X

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the tenth cause of action in plaintiff's First Amended Complaint are true.

XI

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the eleventh cause of action in plaintiff's First Amended Complaint are true.

XII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the twelfth cause of action in plaintiff's First Amended Complaint are true.

XIII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the thirteenth cause of action in plaintiff's First Amended Complaint are true.

XIV

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the fourteenth cause of action in plaintiff's First Amended Complaint are true.

XV

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the fifteenth cause of action in plaintiff's First Amended Complaint are true.

[fol. 124]

XVI

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the sixteenth cause of action in plaintiff's First Amended Complaint are true.

XVII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the seventeenth cause of action in plaintiff's First Amended Complaint are true.

XVIII

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the eighteenth cause of action in plaintiff's First Amended Complaint are true.

XIX

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the nineteenth cause of action in plaintiff's First Amended Complaint are true.

XX

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the twentieth cause of action in plaintiff's First Amended Complaint are true.

XXI

Each and all of the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the twenty-first cause of action in plaintiff's First Amended Complaint are true.

XXII

Said Jerome Distributing Co., Inc., was not a factor nor charged with the duty of paying all freight charges at [fol. 125] tendant to the shipment of said carloads of grapes described in the first six causes of action in plaintiff's First Amended Complaint before accepting delivery thereof from the plaintiff carrier, and plaintiff had no knowledge that said Jerome Distributing Co., Inc., was a factor or charged with such duty.

XXIII

The agreement a copy of which is attached to plaintiff's First Amended Complaint and marked Exhibit "C" is not contrary to any law or statute of the United States of America, and is not void or of no force or effect.

XXIV

Plaintiff's First Amended Complaint, and each count thereof, states facts sufficient to constitute a cause of action against the defendant.

XXV

Neither plaintiff's First Amended Complaint nor any count or cause of action therein contained is barred by the provisions of Paragraph 3, Section 16, of the Interstate Commerce Act of the United States of America as amended.

XXVI

This Court has jurisdiction of the subject matter of plaintiff's First Amended Complaint and of each and every count or cause of action therein set forth.

XXVII

Each and all the allegations in paragraph I of the further, separate and fifth affirmative defense to counts 1, 2, 3, 4

and 5 in plaintiff's First Amended Complaint appearing [fol. 126] in defendant's Amended Answer to Amended Complaint are true.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds that the plaintiff is entitled to a judgment against the defendant for the sum of $13,678.86, together with interest at the rate of 7% per annum on the sum of $1,388.06 from the 28th day of October, 1932, on the sum of $2,564.02 from the 1st day of November, 1932, on the sum of $617.58 from the 2nd day of November, 1932, on the sum of $619.63 from the 9th day of November, 1932, on the sum of $579.03 from the 17th day of November, 1932, on the sum of $5,374.94 from the 18th day of November, 1932, on the sum of $695.51 from the 19th day of November, 1932, on the sum of $1,250.76 from the 21st day of November, 1932, and on the sum of $589.38 from the 22nd day of November, 1932; and for plaintiff's costs of suit herein.

Let judgment be entered accordingly.

Dated: May 14, 1941.

H. Z. Austin, Judge of said Superior Court.

[File endorsement omitted.]

[fol. 127] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

No. 54060. Dept. 3

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

MID-STATE HORTICULTURAL CO., INC., a Corporation, Defendant

JUDGMENT—Filed May 14, 1941

The above entitled action came on regularly for trial on the 20th day of February, 1941, before the Court sitting without a jury, a jury having been waived. W. H. Stammer, Esq., and Galen McKnight, Esq., appearing as attorneys

for the plaintiff and Theodore J. Roche, Esq., of Sullivan, Roche & Johnson and Edward L. Kellas, Esq., of Kellas & Lamberson appearing as attorneys for the defendant; and the evidence and proofs of the respective parties having been heard and duly considered; and the case having been submitted to the Court for its decision; and the Court having filed herein its findings of fact and conclusions of law, awarding judgment to the plaintiff:

Wherefore, It Is Ordered, Adjudged And Decreed that the plaintiff, The Pennsylvania Railroad Company, do have and recover of and from the defendant, Mid-State Horticultural Co., Inc., the sum of $21,822.86 and plaintiff's costs of suit herein, taxed at $

Dated: May 14, 1941.

[fol. 128] H. Z. Austin, Judge of said Superior Court

Entered in Judgment-Book
No. 88 At Page 434.
This 14 Day of May 1941.

[File endorsement omitted.]

[fol. 129] In Superior Court of the State of California, in and for the County of Fresno

[Title omitted]

Notice of Appeal—Filed May 22, 1941

To the Clerk of the above entitled Court:

You Will Please Take Notice that the Mid-State Horticultural Co., Inc., a corporation, the defendant in the above entitled action, hereby appeals to the Supreme Court of the State of California from that certain judgment given and made by the above entitled court in the foregoing action on the 14th day of May, 1941, in favor of the foregoing plaintiff and against said defendant, which judgment was thereafter entered on the 14th day of May, 1941, in Book 88 of Judgments, at page 434 thereof, and from the whole thereof.

Dated this 22nd day of May, 1941.

[fol. 130] Sullivan, Roche & Johnson, Kellas & Lamberson, Attorneys for said Defendant.

[File endorsement omitted.]

[fol. 131] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF FRESNO

[Title omitted]

NOTICE TO CLERK TO PREPARE PAPERS FOR RECORD ON APPEAL PURSUANT TO SECTION 953-a OF THE CODE OF CIVIL PROCEDURE

Filed May 22, 1941

To the Clerk of the above entitled Court:

You Are Hereby Notified that Mid-State Horticultural Co., Inc., a corporation, the defendant in the above entitled action, has appealed from the judgment given, made and entered in the foregoing action in favor of plaintiff and against said defendant and from the whole of said judgment, and said defendant hereby requests that a transcript of all testimony offered or taken upon the trial of said action, all evidence offered or received upon said trial, and all rulings, acts or statements of the court upon said trial, also [fol. 132] all objections or exceptions of counsel upon said trial and all matters to which the same relate be made up and prepared and that a transcript of the phonographic report of the trial of said action, including therein copies of all papers, documents and writings offered or received in evidence, be made up and prepared; and

You Are Hereby Notified that the above named defendant desires to have all of the foregoing papers, records, files and pleadings on file in the above entitled action incorporated in said transcript, to-wit: complaint, amended complaint, amended answer to amended complaint, demurrer to amended answer to amended complaint, motion to strike out portion of amended answer to amended complaint, minute orders relating to overruling and sustaining of demurrer to amended answer to amended complaint and granting of motion to strike out portions of amended answer to amended complaint, findings of fact and conclusions of law, judgment, notice of appeal, notice to clerk to prepare papers and records on appeal under section 953-a of the Code of Civil Procedure, and all other papers making up the judgment roll of said court in said action.

Said defendant has personally arranged with the reporter for his compensation herein.

Dated: May 22, 1941.

Sullivan, Roche & Johnson, Kellas & Lamberson.
Attorneys for Defendant.

[File endorsement omitted]

[fol. 133] In Superior Court of the State of California, in and for the County of Fresno

[Title omitted]

Stipulating Providing for Omission from Record on Appeal of Certain Exhibits—Filed May 26, 1941

It Is Hereby Stipulated that the following matters may be omitted from the transcript of the record on appeal to be prepared and filed pursuant to provisions of section 953(a) of the Code of Civil Procedure of the State of California, viz.,

1. Exhibits "D", "F", "H", "J", "L", "N", "O", "P", "Q", "R", "S", "T", "U", "V", "W", "X", "Y", "Z", "1" and "2" attached to and made a part of plaintiff's amended complaint.

2. Exhibits "E", "G", "I", "K", and "M" attached to and made a part of plaintiffs amended complaint.

It Is Further Stipulated that the bill of lading, a copy [fol. 134] of which is attached to plaintiffs amended complaint on file herein and therein marked Exhibit "A", which is to form a part of the record on appeal herein, is identical in all respects with the exhibits hereinabove referred to in Paragraph 1 of this stipulation, excepting

(a) as to the description of the commodities covered by such bill of lading, date and place of delivery thereof to Atchison, Topeka & Santa Fe Railway Company, date of shipment and place of diversion, all of which, with respect to each shipment, are covered by the allegations of said amended complaint.

(b) that the reference to section 7 of conditions of the shipment appearing upon the face of each of said bills of lading was signed by said defendant, as consignor, only upon exhibits "A", "D", "F", "H", and "J" and upon no others.

It Is Further Stipulated that a special notice identical in form to Exhibit "B" attached to and made a part of said amended complaint, signed by Jerome Distributing Company, Inc., which is to form a part of said record on appeal, was delivered to plaintiff in accord with the allegations of Counts One to Six inclusive of said amended complaint. Said special notice was so signed and delivered only with

reference to the said first six counts contained in plaintiff's amended complaint.

It Is Further Stipulated that either of the parties to said action may at any time make any of said omitted exhibits a part of the record on said appeal.

[fol. 135] This stipulation shall be copied into the Clerk's Transcript of the record on appeal in said action.

Dated: May 23, 1941.

W. H. Stammer, Galen McKnight, Attorneys for Plaintiff, Sullivan, Roche & Johnson, Kellas & Lamberson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 136-137] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 138] In Superior Court of the State of California, in and for the County of Fresno

Honorable H. Z. Austin, Judge

No. 54060

The Pennsylvania Railroad Company, a Corporation, Plaintiff,

vs.

Mid-State Horticultural Co., Inc., a Corporation, Defendant

Statement of Evidence—Filed June 16, 1941

Fresno, California, February 20, 1941.

The above entitled action came on regularly for trial on February 20, 1941 in Department Three of the Superior Court of the State of California, in and for the County of Fresno, Honorable H. Z. Austin presiding. The plaintiff was represented by W. H. Stammer, Esq. and Galen McKnight, Esq., and the defendant was represented by Sullivan, Roche and Johnson, by Theodore J. Roche, Esq., and Messrs. Kellas and Lamberson. The following proceedings were had and testimony taken, to wit:

COLLOQUY

THE COURT: Plaintiff ready?

MR. STAMMER: Plaintiff is ready, your Honor.

THE COURT: Defendant ready?

[fol. 139] Mr. Roche: Ready, your Honor.

Mr. Stammer: May it please the Court, the defendant filed by leave of court an amended answer to the amended complaint. The plaintiff has filed a general demurrer to the fourth affirmative defense in the amended answer, which is the defense of estoppel. The plaintiff has also filed a notice of motion to strike out the fourth defense in the amended answer and each and all of the paragraphs thereof. The matter has heretofore been submitted to the Court on a previous law and motion argument, and the plaintiff, unless the Court requires argument, will submit both the demurrer to the fourth separate defense, and the motion to strike out the fourth separate defense, and each of its paragraphs, upon the points and authorities filed in support of the demurrer and the motion to strike; the position of the plaintiff being that the fourth defense is a defense based upon a claimed esfoppel, which, in turn, rests upon certain conduct of the carrier occurring during and after the carriage of the particular products involved in the plaintiff's amended complaint. The position of the plaintiff is that estoppel is not available as a defense to the collection of the lawful freight, refrigeration and demurrage charges which are claimed in the complaint.

Mr. Roche: Your Honor will recall that during the argument on the motion for leave to file an amended answer, we informed your Honor that if the order was made, in order that no delay should result in the trial of this case, we [fol. 140] would submit without argument, or, more properly speaking, the arguments heretofore made to any demurrer that might be filed, to any part of that answer, and likewise, any motion to strike that might be interposed either to the answer itself, or any portion of that answer. Of course, we are not in accord with the position taken by the plaintiff with respect to the merits either of the motion to strike or the demurrer, but in conformity with the promise which we then made to the Court, we are perfectly willing to submit both these matters upon the argument made some months ago. It occurs to me, however, if your Honor intends to grant the motion to strike, that there

would not be any necessity of disposing of the demurrer. If, on the other hand, your Honor contemplates sustaining that demurrer, there might not be any necessity of their insisting upon the motion to strike. If the motion is granted there would not be anything before the Court upon which the demurrer could fasten itself.

The Court: It occurs to the Court that perhaps the ruling had better be made on the motion to strike.

Mr. Stammer: Well, if the Court please, while both of these proceedings are based upon the same points of law, I think it is perfectly in order for the Court to sustain the general demurrer and then to grant the motion to strike out the particular defense that I have referred to. I'd prefer to have it that way so there would be a ruling on both procedures.

[fol. 141] The Court: The demurrer to the fourth defense —fourth defense in the answer, is sustained, and the motion to strike is granted.

Mr. Stammer: Well, if the Court please, the causes of action in the amended complaint are all based upon the shipment of certain cars of grapes in Interstate Commerce and each cause of action is a cause of action for the recovery of the freight, refrigeration and demurrage charges fixed by the tariffs, published and filed with the Interstate Commerce Commission, pursuant to the provisions of the Interstate Commerce Act. The allegations of the complaint are all admitted with the single exception of the allegation that the sum claimed in each cause of action is now due, owing and unpaid from the defendant to the plaintiff, together with interest thereon at the rate of 7 per cent per annum, from the date of delivery of shipment. That particular allegation is denied. I think it is admitted that a demand was made on the defendant for payment of freight charges, and that the defendant refused to pay. Another defense raised by the answer, which is a defense, as I see it, of law, entirely, namely, that the agreement entered into between plaintiff and defendant, which had for its effect a waiver of the time provisions of the Interstate Commerce Act, which is claimed by the defendant to be invalid and void. Therefore, in presenting evidence, the plaintiff will present evidence only upon the single denial by the defendant that the amount of freight payments due and unpaid, in each cause [fol. 142] of action, from the defendant to the plaintiff—By the way, if the Court please, before the introduction of evi-

dence, I'd like to associate Mr. Galen McKnight as attorney for the plaintiff.

The Court: Very good. The Clerk will make the proper order.

Mr. Stammer: Now, in the file is the original deposition, your Honor, taken in the East of several witnesses for the plaintiff——

The Court: All right.

Mr. Stammer: The plaintiff, now, your Honor, desires to read in evidence the direct examination of the witness John Savage, Jr., taken in a deposition before William H. Vogt, a notary public in and for the County of New York, New York State, on September 7, 1939.

Mr. Roche: I was going to suggest, Mr. Stammer, if you have a copy of the deposition, it might be advisable to permit the Court to follow the original, because there are certain exhibits attached to the original deposition which it might be advisable for his Honor to read, as the deposition proceeds. We haven't any objection to your using a copy, Mr. Stammer.

Mr. Stammer: Thank you, Mr. Roche. Direct Examination of Mr. John Savage, Jr., from the deposition. (Reading:)

"Q. Where do you reside?

"A. Kromer Avenue, Berwyn, Pennsylvania.

"Q. By whom are you employed?

"A. By the Pennsylvania Railroad Company in the office [fol. 143] of the Treasurer, Broad Street Station Building, Philadelphia, Pa.

"Q. How long have you been employed by The Pennsylvania Railroad Company?

"A. 41 years.

"Q. What is your present position in the office of the Treasurer?

"A. Chief Clerk in charge of credits and collections.

"Q. How long have you occupied that position?

"A. Since January 1, 1919.

"Q. What are your duties in that position?

"A. Among other things, to supervise the collection of bills and moneys due The Pennsylvania Railroad Company.

"Q. Generally speaking, have your duties been the same since January 1, 1919?

"A. Yes.

"Q. What were your duties in November, 1932?

"A. They were the same.

"Q. Can you describe, Mr. Savage, a little more fully what your duties were in connection with the collection of bills or money due the Pennsylvania Railroad?

"A. Of course. Among other things, with respect to the supervision of the collection of bills and moneys due the railroad company, I ascertain instances in which the Pennsylvania Railroad has not received, in whole or in part, transportation charges on shipments delivered by it at destination.

"Q. Mr. Savage, I refer to a certain shipment made October 7, 1932 from Conejo, California, in car SFRD 17404 delivered by The Pennsylvania Railroad Company to Je- [fol. 144] rome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. The Pennsylvania Railroad Company never received any amount whatsoever of these transportation charges.

"Q. What is the amount of the charges due upon the shipment to which I have just referred?

"A. $695.51.

"Q. I refer to a certain shipment made October 6, 1932 from Conejo, California, in car SFRD 22471, also delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. The Pennsylvania Railroad Company never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due on that shipment?

"A. $698.33.

"Q. I refer to a certain shipment made October 22, 1932 from Cooperage Spur, Fresno, California, in car PFE 13520, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania [fol. 145] Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. The Pennsylvania Railroad never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due on that shipment?

"A. $617.58.

"Q. I refer to a certain shipment made October 22, 1932 from Cooperage Spur, Fresno, California, in car PFE 71996, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due on that shipment?

"A. $619.18.

"Q. I refer to a certain shipment made October 22, 1932 from Hew House, California, in car SFRD 18007, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges upon that ship-
[fol. 146] ment.

"Q. What is the amount of charges due on that shipment?

"A. $621.58.

"Q. I refer to a certain shipment made October 9, 1932 from Quality, California, in car PFE 28824, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $667.33.

"Q. I refer to a certain shipment made October 8, 1932 from Quality, California, in car PFE 36495, delivered by The Pennsylvania Railroad Company to Jerome Distrib-

uting Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges upon that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $687.73.

[fol. 147] "Q. I refer to a certain shipment made October 8, 1932 from Quality, California, in car PFE 24375, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $683.83.

"Q. I recer to a certain shipment made October 22, 1932 from Quality, California, in car PFE 1478, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $660.43.

"Q. I refer to a certain shipment made October 29, 1932, from Quality, California, in car PFE 71971, delivered by The Pennsylvania Railroad Company to Jerome Distrib-
[fol. 148] uting Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $589.38.

"Q. I refer to a certain shipment made October 6, 1932 from Quality, California, in car PFE 36105, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $689.73.

"Q. I refer to a certain shipment made October 22, 1932 from Quality, California, in car PFE 14745, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation [fol. 149] charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $662.83

"Q. I refer to a certain shipment made October 7, 1932 from Quality, California, in car PFE 13607, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $670.33.

"Q. I refer to a certain shipment made October 7, 1932 from Quality, California, in car PFE 15847, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad

ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

[fol. 150] "Q. What is the amount of charges due upon that shipment?

"A. $667.13

"Q. I refer to a certain shipment made October 8, 1932 from Quality, California, in Car PFE 71402 and delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $682.63.

"Q. I refer to a certain shipment made October 27, 1932 from Quality, California, in car PFE 33599, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $638.33.

[fol. 151] "Q. I refer to a certain shipment made October 31, 1932 from Quality, California, in car PFE 71079,——"

Mr. Stammer: I might say that I think that is a transposition. It should be car No. 71097.

Mr. Roche: Well, it is so stipulated, your Honor. I noticed that in the deposition.

The Court: It is not corrected on the face of this original.

Mr. Stammer: It is not. But, reading it into evidence, if Mr. Roche is satisfied, I will read it as PFE 71097.

Mr. Roche: I am perfectly willing to submit, may it please your Honor, that the correction may be made upon the face of the deposition.

The Court: Very good.

Mr. Stammer (Continuing reading): "—delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $581.38.

"Q. I refer to a certain shipment made October 23, 1932 from Quality, California, in car PFE 14118, delivered by The Pennsylvania Railroad Company to Jerome Distrib- [fol. 152] uting Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $579.03.

"Q. I refer to a certain shipment made October 7, 1932 from Quality, California, in car PFE 16444, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $671.53.

"Q. I refer to a certain shipment made October 8, 1932 from Quality, California, in car PFE 32461, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received, from any source whatsoever, the transporta- [fol. 153] tion charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $682.43.

"Q. I refer to a certain shipment made October 26, 1932 from Quality, California, in car PFE 16386, delivered by The Pennsylvania Railroad Company to Jerome Distributing Company, Inc. at Manhattan Produce Yards, New Jersey, and ask you whether the Pennsylvania Railroad ever received from any source whatsoever, the transportation charges that accrued on that shipment?

"A. It did not; the Pennsylvania Railroad never received any amount of the transportation charges on that shipment.

"Q. What is the amount of charges due upon that shipment?

"A. $619.63.

"Q. Did the Pennsylvania Railroad ever receive any checks from any one in connection with the transportation charges concerning which you have just testified?

"A. Yes, it did. It received a check November 21, 1932, drawn on the National Bank of Yorkville in New York by Jerome Distributing Company, Inc.

"Q. To whom was that check payable?

"A. It was payable to the order of The Pennsylvania Railroad Company for $10,433.46.

[fol. 154] "Q. What did the Pennsylvania Railroad do with this check?

A. The check was deposited in Chase National Bank for collection November 22, 1932.

"Q. Was that check ever paid by the National Bank of Yorkville?

A. No.

"Q. Was the check returned to the Pennsylvania Railroad?

A. The check was returned to the Pennsylvania Railroad by the Chase National Bank, one of our depositors in New York City, with the advice from the National Bank of Yorkville that it had been returned marked 'Insufficient funds'.

"Q. What did that notation mean to you?"

Mr. Roche: Counsel need not read our objections unless we insist upon it.

Mr. Stammer (continuing reading):

"A. That the depositor did not have sufficient funds in the bank to meet the check.

"Q. I show you this check and ask you whether that is the check to which you have just testified?

"A. That is the check."

Mr. Stammer: If the Court please, we will now offer in evidence the check referred to by the witness, which is attached to the deposition. It will have to be marked as an exhibit in the case anyway.

Mr. Roche: It might be best, if your Honor please, to have the Clerk mark the exhibit as it is attached to the deposition, and then avoid the necessity of taking it out, unless your [fol. 155] Honor should prefer some other procedure. We haven't any objection to the check being——

Mr. Stammer: Simply a matter of machinery, Mr. Roche, so that the Reporter can get the record in order. That is the only reason I am reading this deposition instead of introducing it. I thought perhaps the easiest thing to do would be, in each instance, to introduce the particular exhibit and have it marked so that it would just come in regular order in the court record, outside of the deposition.

Mr. Roche: That procedure is perfectly agreeable.

Mr. Stammer: My only feeling in that is that we can probably eliminate all reference to the deposition. We will offer this, then, in evidence as Plaintiff's Exhibit 1, your Honor.

The Court: Very well.

Mr. Stammer: Being a check dated November 12, 1932, No. 7701 payable to the order of Pennsylvania Railroad Company for $10,433.46, signed, Jerome Distributing Co., Inc., by J. Fichtelberg.

The Court: It is admitted. It will be marked Plaintiff's Exhibit No. 1. (A copy of Pltff's Ex. 1 at end of transcript.)

Mr. Stammer (continuing reading):

"Q. Did the Pennsylvania Railroad ever receive any other check besides the one concerning which you have just testified?

A. Yes. It received a check dated November 22, 1932 for $7,035.19 drawn by Jerome Distributing Company, Inc. on [fol. 156] the National Bank of Yorkville in New York, payable to the Pennsylvania Railroad.

"Q. When was this check received?

A. November 21, 1932.

"Q. What did the Pennsylvania Railroad do with this check?

A. It was deposited November 22, 1932 in the Chase National Bank for collection.

"Q. Was that check ever paid by the bank on which it was drawn?

A. No.

"Q. Was the check returned to you?

A. Yes, it was.

"Q. By whom was it returned?

A. It was returned by the Chase National Bank with the notation 'insufficient funds.'

"Q. I show you this check and ask you whether it is the check concerning which you have just testified?

"A. That is the check."

Mr. Stammer: We will now offer in evidence that check which was attached to the deposition and marked Plaintiff's Exhibit 2, as Plaintiff's Exhibit 2 in this action.

The Court: Admit it.

Mr. Stammer: Being check No. 7696, dated November 19, 1932, payable to the Pennsylvania Railroad Company for $9237.11, signed by Jerome Distributing Co., Inc., J. Fichtelberg.

Mr. McKnight: That is not the check, Mr. Stammer, that is number two in the deposition.

Mr. Stammer: That is right. They may—may that offer [fol. 157] be stricken out? It would be somewhat confusing at this point.

The Court: Yes.

Mr. Stammer: And I will make the offer—I will offer in evidence as Plaintiff's Exhibit 2——

The Court: Admit it.

Mr. Stammer: The check appearing in the deposition as Plaintiff's Exhibit 2, being No. 7707, dated November 22, 1932, payable to Pennsylvania Railroad Company in the sum of $7035.19, signed by Jerome Distributing Co., Inc. by J. Fichtelberg.

The Court: Admit it.

(A copy of Plaintiff's Exihibit 2 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. I show you two pieces of paper and ask you whether they constitute the notice which you received upon the return of the check for $7,035.19?

"A. Yes, they do."

Mr. Stammer: I will now offer in evidence as Plaintiff's Exhibit 3 the two notices attached to the deposition and marked Exhibit 3.

Mr. Roche: Now, we desire, may it please your Honor, to object to the introduction in evidence of the exhibit here offered, on the ground it is incompetent, irrelevant and immaterial, hearsay as against us, not binding upon us and relating to a transaction other than the transaction to [fol. 158] which the defendant in this case is a party.

Mr. Stammer: We submit it, if the Court please. It is the nonpayment by the bank of a particular check, which we offer in support of the witness's testimony.

The Court: Objection is overruled.

(A copy of Plaintiff's Exhibit 3 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. I show you a piece of paper and ask you whether that is the notice you received in connection with the check for $10,433.46, concerning which you previously testified?

A. Yes, it is."

Mr. Stammer: We now offer as Plaintiff's Exhibit 4 the notice attached to the deposition as plaintiff's exhibit 4.

Mr. Roche: Now, to that notice, may it please the court, we make the same objection.

The Court: Same objection and same ruling.

(A copy of Plaintiff's Exhibit 4 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. Did the Pennsylvania Railroad receive any other checks from the Jerome Distributing Company, Inc. at that time?

A. It received a check for $9,237.11, dated November 19, 1932 on that same day. The check was that of the Jerome Distributing Company, Inc. drawn on National Bank of Yorkville in New York and payable to the Pennsylvania Railroad.

[fol. 159] "Q. What was done by the Pennsylvania Railroad with that check?

A. That check was deposited in the Chase National Bank for collection on November 22, 1932.

"Q. Was that check ever paid by the bank on which it was drawn?

A. No.

Q. Was the check returned to you?

A. It was returned by the Chase National Bank with notation of the National Bank of Yorkville 'short'.

"Q. Now, I show you this check and ask you whether that is the check for $9,237.11 concerning which you just testified?

A. Yes, it is."

Mr. Stammer: The Plaintiff now offers in evidence as Plaintiff's Exhibit 5, the check attached to the deposition as exhibit 5.

The Court: Admit it.

(A copy of Plaintiff's Exhibit 5 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. Now, I show you two slips of paper clipped together and ask you whether they constitute the notification received by the Pennsylvania Railroad with respect to the disposition of the check for $9,237.11?

"A. Yes, they do."

Mr. Stammer: We will now offer in evidence as Plaintiff's Exhibit 6 the two notices attached to the deposition as exhibit 6.

Mr. Roche: Now, to that offer we make the same objection, [fol. 160] your Honor.

The Court: Same ruling. Objection overruled.

(A copy of Plaintiff's Exhibit 6 will be found at the end of this transcript.)

Mr. Stammer (continuing reading):

"Q. Referring to the three checks, Plaintiff's Exhibits 1, 2, and 5, will you tell me whether they were delivered by the Jerome Distributing Company, Inc. to the Pennsylvania Railroad in connection with the transportation charges on any of the shipments concerning which you previously testified?

"A. These checks purported to be in payment of those charges and other charges on various shipments.

"Q. Can you tell me which of the shipments concerning which you testified previously were covered by the check for $10,433.46, plaintiff's Exhibit 1?

A. Yes.

"Q. Will you tell that?

A. The charges on PFE 36495, $687.73; PFE 24375, $683.83; PFE 13607, $670.33; PFE 71402, $682.63; PFE 35599, $638.33; PFE 14118, $579.03; PFE 32461, $682.43; PFE 16386, $619.63; and PFE 15847, an amount of $665.13. The charges on this car amounted to $667.13 and the balance of $2 was included in the check for $7,035.19. Also PFE 16444, an amount of $2. The balance on this car, of $669.53, was included in the check fo- $7,035.19.

"Q. Can you tell me whether the charges on any of the shipments concerning which you previously testified were [fol. 161] covered by the check for $7,035.19, plaintiff's Exhibit 2?

A. Yes.

"Q. What charges were covered by that check?

"A. The charges on SFRD 17404, $695.51; PFE 28824, $667.33; PFE 71971, $589.38; PFE 71097, $581.38; PFE 15847, $2—the balance of $665.13 outstanding on this car was included in the check for $10,433.46, concerning which I previously testified; PFE 16444, $669.53—the balance of charges of $2 outstanding on this car was included in the check for $10,433.46 as heretofore testified.

"Q. Can you tell me whether the charges outstanding on any of the shipments concerning which you initially testified were covered by the check for $9,237.11; plaintiff's Exhibit 5?

A. Yes. The charges on RD 22471, $698.33; PFE 13520, $617.58; PFE 71996; $619.18; SFRD 18007, $621.58; PFE 1478, $660.43; PFE 36105, $689.73; and PFE 14745, $662.83.

"Q. At the time these checks were tendered to the Pennsylvania Railroad did the railroad give any receipt to Jerome Distributing Company, Inc.?

"A. The Pennsylvania Railroad gave Jerome Distributing Company, Inc. a receipted freight bill in connection with each shipment covered by these charges.

"Q. Under what circumstances were these receipts given?

"A. Subject to collection.

[fol. 162] "Q. What do you mean when you say 'subject to collection'?

"A. I mean subject to the honoring and payment of the checks on the banks on which they were drawn.

"Q. Do I understand that the receipts were given merely in anticipation that the checks would be honored?"

Mr. Roche. Just a minute, your Honor. We object to that question upon the ground it is incompetent, irrelevant and immaterial.

Mr. Stammer. If the Court please—pardon me. Go ahead. I did not mean to interrupt.

Mr. Roche: I notice the objection here, and in addition to those that are stipulated here, that if is not the best evidence, I am going to cover that objection, but the real objection would be this one that is not reserved, that it calls for the conclusion of the witness.

The Court: Well, I suppose——

Mr. Stammer: If the Court please, so far as the last objection is concerned, I assume it would not be available, because it would be a mere objection to the form of the question. However, so far as the evidence, itself, is concerned, this is evidence of the manner in which the check was received by the Pennsylvania Railroad Company, which I think it material. This particular man was the man in the Treasurer's office, in charge of the collections and receipt of payments. He is the only person that could testify for the Pennsylvania Railroad Company the manner [fol. 163] in which they received the checks and the intent with which it was received.

The Court: Wouldn't they be bound by the receipt and the circumstances attending this transaction?

Mr. Stammer: Not at all, your Honor, for two reasons. In the first place, the acceptance of the check is never payment unless there is an express agreement to that effect, and that the giving and receiving of the check, and the giving of a receipt therefor are not sufficient to show payment. In other words, a check which is received in the ordinary course of business, in law, is received subject to its payment and collection. There is another reason for that rule in this particular case, namely, that the defendant, here, has an independent liability and duty to pay these freight charges, and only the actual payment of the charges could relieve him from that duty. So, this is to show by the testimony of this witness that the check was received in the ordinary course of business, subject to collection.

Mr. Roche: May I just say this, your Honor? The last suggestion made by Mr. Stammer does not go to the—does not go to the objection, itself, it goes to the effect of the evidence, if it is admitted, and the effect of the evidence as it stands at the conclusion of this case. If Mr. Stammer is correct in stating that, under those circumstances, can transportation charges made by a common carrier, which is under the jurisdiction of the Interstate Commerce Com- [fol. 164] mission, constitute a payment of those charges? Of course, that is a legal proposition, and properly should be addressed to your Honor at the conclusion of this case. Even though Mr. Stammer is correct in that statement, it would not permit testimony to come into this record which would otherwise be objectionable. There isn't any question at all, may it please the Court, respecting the principle alluded to by Mr. Stammer, that the mere giving of a check which thereafter is not paid, does not in and of itself constitute payment. There must be some understanding or some agreement that the check shall be received as payment of the obligation in satisfaction of which the check is given. But the authorities are uniform to the point that you do not have to establish that agreement by positive or direct evidence. In other words, it can be established substantially. If a man receives a check in payment of—from his debtor, in payment of an obligation due him, and he gives a receipt and makes no objection for years afterwards to the nonpayment of that check, even though there might not be an express agreement between the parties at the time the check was given and the receipt signed, nevertheless, the Court would be allowed, upon that testimony to determine that he check was, in fact, received in extinguishment of the obligation. Now here, may it please the Court, we have a situation already developed by the testimony. These checks were received, the testimony shows that receipts were given to the Jerome Distributing Company by [fol. 165] the Pennsylvania Railroad Company. That is already testified to by the witness. We submit, may it please your Honor, that the question which has just been read to your Honor is not a proper question to be addressed to a witness, considering the subject matter. I am willing to concede, too, may it please your Honor, that probably the last objection made by me does go to the form of the question, and ought not to be considered by your Honor because it was not made at the time the deposition was

taken; but we still submit the testimony is incompetent, irrelevant and immaterial.

Mr. Stammer: Well, I am not, your Honor, prepared to concede Mr. Roche's statement of the principle of law in its entirety, in view of the fact that courts have held——

Mr. Roche: May I add this to the objection, one I think your Honor should have a right to consider, although not made during the taking of the deposition, and that is, no proper foundation has been laid. In other words, may it please your Honor, it does not appear here that Mr. Savage was the particular individual connected with the railroad company to whom these checks were given, and by whom receipt or receipts were signed. Now he is undertaking to testify, may it please your Honor, with respect to an understanding, or understandings occurring between, we will say, the Jerome Distributing Company on the one side and some other official of the plaintiff, the railroad company, on the other. The question is, "'Do I understand that [fol. 166] the receipts were given merely in anticipation that the checks would be honored?" Now, that is clear, may it please the Court. No testimony has been introduced tending to show that Mr. Savage was the particular official of that company to whom the checks were delivered or by whom the freight bills were receipted.

The Court: (After argument) Isn't that an obvious conclusion?

Mr. Stammer: I don't think so, your Honor. It is my position that the proper person, the employee of the Pennsylvania Railroad in charge of these collections can state how these checks were accepted, and that is what he says, they were accepted subject to the anticipation that the checks would be honored. In other words, subject to collection.

The Court: Doesn't that occur whenever a check is given?

Mr. Roche: I can readily understand what your Honor has in mind, because I can understand, your Honor, assuming a man isn't receiving a check in satisfaction of an obligation, unless he felt the check would thereafter be paid by the bank upon which it was drawn. Nevertheless, there are controversies that come up in courts of justice where just that exact situation was involved. Now, suppose, may it please your Honor, that these checks were turned over to the railroad company covering these particular charges,

and the witness has testified these checks did cover these particular carrier charges, as well as others, and suppose [fol. 167] that it should afterwards appear, may it please your Honor, or, as it has to some extent already appeared during the taking of this deposition, that upon the receipt of those checks, these freight bills were actually receipted by the railroad company; and suppose, may it please your Honor, it should appear that for a year and a half or two years thereafter, the railroad company undertook to enforce payment of these checks as against the Jerome Distributing Company, and never at any time notified the defendant in this case, who they claim is responsible for those carrier charges, that the carrier charges had not in fact been paid. Now, it does seem to me that upon that testimony that the court might be justified, assuming that a finding of that kind could be made in a case of this character, that the court would be justified in finding from the surrounding facts and circumstances that the railroad company did actually rely upon the credit of the Jerome Distributing Company, and did accept those checks in payment of these charges; and when the checks were not paid, instead of seeking to enforce the payment of these charges against the defendant, it sought to enforce the payment of the checks against the Jerome Distributing Company, which was exactly what occurred in this particular case.

Mr. Stammer: Well, if the Court please, may I answer that first, because Mr. Roche is now injecting into the back door the principle of estoppel, which has been straightened out. I want the court to be careful of this, and distinguish [fol. 168] between those two things. This entire argument might be relevant upon a definition of estoppel, but in this particular case, and in all cases, the burden of proof of payment in the end is upon the defendant, and we are simply showing the circumstances under which the checks were given. The authorities seem to be clear that the giving of a receipt is not evidence of the express agreement which must be made in order to change the ordinary rule of law.

The Court: Aren't you asking this witness to decide that very legal question?

Mr. Stammer: No, I am asking him only what intention the Pennsylvania Railroad Company had when it accepted the check and that is what it amounts to.

The Court: Well, all right, we will overrule the objection. Objection overruled. Go ahead.

Mr. Stammer (Continuing reading):

"A. Yes.

"Q. Were these checks accepted by the Pennsylvania Railroad as payment of the particular charges which they purported to cover?"

Mr. Roche: Same objection, your Honor.

The Court: Same ruling.

Mr. Stammer (Continuing reading):

"A. These checks were not accepted by the railroad as payment.

"Q. How then did the Pennsylvania Railroad accept these checks?"

[fol. 169] Mr. Roche: Same objection, your Honor.

The Court: Same ruling.

Mr. Stammer (Continuing reading):

"A. Subject to the collection and payment of the checks.

"Q. Under what circumstances would the Pennsylvania Railroad have regarded itself itself as having been paid these charges?"

Mr. Roche: We make the same objection, your Honor, to that question. Your Honor will observe that during the taking of the deposition itself, in addition to the general objection, the objection that it is not binding upon the defendant and calls for a conclusion was expressly made, and we certainly insist, may it please the Court, that the question does call for a conclusion of the witness, aside from the objections made.

The Court: I am inclined to think that is correct. Objection is sustained.

Mr. Stammer: (Continuing reading).

"Q. Now, finally, has the Pennsylvania Railroad received from any source whatsoever payment of the charges concerning which you have previously testified?"

Mr. Roche: Same objection.

The Court: Same ruling. It is already in evidence.

Mr. Stammer: Pardon me?

The Court: It is already in evidence. Objection is sustained.

[fol. 170] Mr. Roche: Now, I will read your Honor the cross-examination of this witness, which was conducted by Mr. Silverman, of New York. (Reading):

"Q. Mr. Savage, have you——"

The Court: (Interrupting.) What page is that?

Mr. Roche: Page 17, near the bottom of the page.

The Court: All right.

Mr. Roche: (Reading) "Q. Mr. Savage, have you all the records of the railroad company with you regarding the shipment of the twenty-one carloads of merchandise mentioned in the complaint?

"A. Yes, I believe we have all the papers relating to each shipment and its delivery.

"Q. Have you the records of all business transacted between the Pennsylvania Railroad and the Jerome Distributing Company, Inc. with you?"

Mr. Stammer: To which we object on the ground that any records, outside of the ones affecting these cars would be incompetent, irrelevant and immaterial.

Mr. Roche: It is a preliminary question, your Honor.

The Court: All right.

Mr. Roche: (Continuing reading) "A. No, I have not.

"Q. Have you been testifying from memory?

"A. No.

"Q. Have you been referring to records in giving this testimony today?

"A. I have been referring to a memorandum that I prepared from the records.

[fol. 171] "Q. Have you copies of the receipted freight bills with you with reference to the twenty-one carloads?

"A. Yes.

"Q. May I see them? Mr. Savage, I show you copies of a freight bill produced by you, covering SFRD 17404 dated November 19, 1932. Upon receipt of the check of the Jerome Distributing Company, Inc. do you put a paid stamp on the bill?"

Mr. Stammer: Just a minute, Mr. Roche. For the purpose of the record, we will object to that on the ground that the mark on the freight bill "Paid" is incompetent, irrelevant and immaterial, that it is not proof of payment, nor does it prove the receipt of the freight charges by the plain-

tiff here, which would relieve the defendant of his independent obligation to pay the freight charges.

Mr. Roche: Well, it seems to me, may it please your Honor, the answer to that objection just made is that this is proper cross-examniation. Whether, when this testimony is in, it measures up to the requirements of the law, presents an entirely different situation. But your Honor will recall, and I call your Honor's attention to the upper part of page 16, that in answer to a question put by plaintiff's counsel, the witness testified the Pennsylvania Railroad gave Jerome Distributing Company, Inc. a receipted freight bill in connection with each shipment covered by these charges; and certainly it is proper cross-examination.

The Court: I think so. Objection is overruled.

[fol. 172] Mr. Roche (Continuing reading): "A. Yes.

"Q. Is that underneath the words 'Received Payment for the Company'?

"A. It is usually a rubber stamp with the agent's name on it."

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Continuing reading) "Q. And that is upon receipt of the check?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Reading) "A. Yes.

"Q. Now, Mr. Savage, you testified that a freight bill was delivered to Jerome Distributing Company, Inc. for each of the carloads of merchandise mentioned in the complaint?"

Mr. Stammer: Same objection.

The Court: Objection overruled.

Mr. Roche: (Reading) "A. That is right, yes.

"Q. Well, I understand that upon receipt of the three checks, plaintiff's Exhibits 1, 2 and 5, that each of the freight bills was stamped by the Pennsylvania Railroad 'Paid'?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Reading) "A. I have not seen the receipts but it is my impression that they were marked 'paid' or 'received payment' by the agent.

[fol. 173] "Q. The agent for the Pennsylvania Railroad? But there is no question in your mind that they were either marked 'paid' or 'received payment'?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Reading) "A. I think that is correct.

"Q. Is there anything in writing on any of the freight bills involved in this action wherein a statement is made that the receipt of the check shall only be considered payment if the check is eventually paid?"

Mr. Stammer: To which we object on the same ground.

Mr. Roche: Well, that certainly is proper cross-examination, your Honor, because the witness is being asked, may it please your Honor, for the writing upon the freight bill.

The Court: Haven't we got them here?

Mr. Roche: Pardon?

The Court: Have we got those here?

Mr. Roche: Well, the situation is this, your Honor; we have one of the freight bills, possibly two of the freight bills, but the freight bills were returned by the defendant in this case to the railroad company in connection with some claims that were not involved in this action.

The Court: All right. Objection is overruled.

Mr. Roche: (Reading) "A. Not that I am aware of.

"Q. Well, you have been with the Company for forty one years, I understand? Is that true?

"A. Yes.

"Q. Have you ever seen a similar statement in writing [fol. 174] on any of your freight bills?"

Mr. Stammer: Same objection, your Honor.

The Court: Same ruling.

Mr. Roche: (Reading) "A. No, I have not.

"Q. The, as I understand it, upon receipt of the check the freight bill is marked 'Paid' or 'Payment Received'?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche: (Reading) "A. That's right.

"Q. You testified on direct examination that when you received a check, and when I say 'you' I mean the Pennsylvania Railroad, you did not consider it payment until the check cleared the bank, is that right?

"A. That is correct.

"Q. Is there anything in writing on any of your bills or the paid stamp you testified to, which would indicate that?"

Mr. Stammer: I want the same objection.

The Court: Yes. Same ruling.

Mr. Roche: (Reading) "A. Not that I am aware of.

"Q. Now, when you receive a check do you immediately credit the debtor with the amount of the check in your books?"

Mr. Stammer: Same objection to that, if the Court please, on the ground it is incompetent, irrelevant and immaterial, does not constitute any proof of acceptance of the check in payment, if there was such an entry.

[fol. 175] The Court: I think that is cross-examination, probably.

Mr. Roche (Reading):

"A. Yes.

"Q. Do you know when the twenty-one cars were delivered to Jerome Distributing Company?

"A. Not of my personal knowledge. The records of the Company——

"Q. Mr. Savage, the Pennsylvania Railroad does extend credit to receivers or shippers for freight charges?

"A. Yes, it does.

"Q. How long a period?

"A. The order of the Interstate Commerce Commission limits the period to 96 hours.

"Q. Does the Pennsylvania Railroad limit it to 96 hours?

"A. The great bulk of the accounts of the Pennsylvania Railroad of freight shippers settle on a 48 hour basis when that period of credit is authorized from our office.

"Q. Did the Jerome Distributing Company, Inc. have a line of credit with the Pennsylvania Railroad at the time in between October and November, 1932?

"A. Yes, it did.

"Q. And for how long a period of time did its credit extend?

"A. That credit was similar to the credit extended a perishable receiver and that is on a 48 hour basis.

"Q. How long prior to November, 1932 did Jerome Distributing Company, Inc. have a line of credit with you, approximately?

"A. Since May, 1924.

[fol. 176] "Q. And in all that period you extended 48-hour credit to them? Is that right?

"A. Yes, that is correct.

"Q. Did the Jerome Distributing Company, Inc. have a bond up with you to secure that credit?"

Mr. Stammer: Just a minute. To which we object on the ground it is incompetent, irrelevant and immaterial.

The Court: I think probably it would be material.

Mr. Roche: May it please your Honor, I am perfectly willing to have your Honor sustain the objection to that question.

The Court: All right. Objection is sustained.

Mr. Roche (Reading):

"Q. Don't you require that from shippers or receivers?"

Mr. Stammer: Same objection.

Mr. Roche: It seems to me, may it please your Honor, that that is proper cross-examination in view of the fact that the witness undertook to testify that these checks were not received in payment, but merely in anticipation of payment.

Mr. Stammer: May I say this, your Honor——

The Court (Interrupting): Objection sustained.

Mr. Roche (Reading):

"Q. So that so far as Jerome Distributing Company, Inc. is concerned, you were satisfied with their credit?

"A. We were.

"Q. Now, with regard to the check for $10,433.46, Plaintiff's Exhibit 1, you testified that the check included approximately the freight charges on ten carloads of mer-

[fol. 177] chandise involved in this suit?

"A. That is right.

"Q. Now, there were other charges included in that check, is that so?

"A. Yes.

"Q. Covering other cars?"

"A. Yes.

"Q. Shipped by other shippers than the defendant herein?

"A. That is right.

"Q. And they were shipped to Jerome Distributing Company, Inc.?"

Mr. Stammer: We will object to that on the ground that it would be incompetent, irrelevant and immaterial, if they were shipped to Jerome by other shippers.

Mr. Roche: I want to show, your Honor, that the ten thousand dollar check did not cover only these charges, and therefore it is proper cross-examination on that subject.

The Court: Very good. I think so. Objection is overruled.

Mr. Roche (Reading):

"A. They were either shipped to Jerome Distributing Company, Inc. or reconsigned to if.

"Q. By shippers other than Mid-State Horticultural Company?"

Mr. Stammer: Same objection.

The Court: Same ruling.

Mr. Roche (Reading):

"A. Yes.

"Q. Were those charges paid to you?"

Mr. Stammer: Same objection, your Honor.

Mr. Roche: Well, I think that is proper cross-examination, your Honor.

[fol. 178] The Court: Probably is proper cross-examination. Objection overruled, on that ground.

Mr. Roche (Reading):

"A. None of the other charges in the check for $10,433.46 have been collected.

"Q. When the check for $10,433.46 was returned from the bank what did you do about it?

"A. I asked our special representative in the Treasury Department office in New York to handle personally with Jerome Distributing Company, Inc. As a matter of fact,

he had direct advice from the bank prior to the check's being returned to our office, according to the arrangement in effect.

"Q. When was the check returned by the bank?

"A. The advice of the Chase National Bank is dated November 25, 1932 and was apparently received with a letter from the bank that same date, which reached our office November 26th.

"Q. When did you turn the matter over to your man in New York?"

Mr. Stammer: Just a moment. May I object to that, if the Court please, upon the ground it is incompetent, irrelevant and immaterial. It wouldn't be a defense to the claim against the defendant here, or a waiver of their obligation to pay it.

Mr. Roche: The question, as I see it, is this: The plaintiff found it necessary to take this deposition, and in the taking of the deposition undertook to show these checks [fol. 179] were not received by the plaintiff as payment, but for the purpose of collection. Now, if Mr. Stammer is correct in the legal proposition, it goes to the weight of the evidence, the effect of the evidence at the conclusion of the case, and can not prevent us from conducting a cross-examination of the witness.

Mr. Stammer: We are still able to say, your Honor, that cross-cross-examination on an immaterial point is not a cross-examination, unless it would tend to prove an agreement to accept checks as payment. I don't think it is admissible.

The Court: Objection overruled. I think it is proper cross-examination.

Mr. Roche (Reading):

"A. The ten thousand dollar check was sent to our man in New York on November 28, 1932.

"Q. Did you ever get a report from this man?

"A. Yes. We had reports by telephone.

"Q. When?

"A. The records do not show the date.

"Q. Do the records show a telephone call?

"A. There are some memoranda here that indicate telephone calls.

"Q. When for the first time did the Pennsylvania Railroad notify Mid-State Horticultural Company of the non-payment of the check, Plaintiff's Exhibit 1?"

Mr. Stammer: To which we object, if the Court please, upon the ground it is incompetent, irrelevant and immaterial; that the evidence is inadmissible because it would [fol. 180] not, under the authorities, constitute any defense to the action, the mere failure of the railroad company to notify the person liable for freight; and his failure to collect from any other person, also, would not be any defense.

Mr. Roche: It seems to us that the only objection that can be—could be urged at the present time would be that it is not proper cross-examination. The plaintiff in this case saw fit to have this witness testify respecting this particular subject matter on direct, and certainly, may it please your Honor, we would have the right to cross-examine him; whether the testimony upon direct and cross-examination would benefit us at the conclusion of the case presents an entirely different legal situation.

The Court: Objection is overruled. I'd like to know that.

Mr. Roche (Reading):

"A. As I said before, we had an arrangement with our representative in New York to obtain telephone advice from our depositary and, so far as we know, our representative immediately contacted Joe Fichtelberg, the President, as that was part of his duty.

"Q. Joe Fichtelberg is President of Jerome Distributing Company, Inc., is he not? The question I asked was when for the first time did the Railroad notify Mid-State Horticultural Company in writing of the non-payment of the check?"

Mr. Stammer: To which we make the same objection, if [fol. 181] the Court please.

The Court: Yes.

Mr. Roche (Reading):

"A. I recall very distinctly a meeting we had in the office of Mr. C. B. Sudborough, then General Traffic Manager of the Pennsylvania Railroad, at which our attorneys were also present as well as Mr. Setrakian, of Mid-State Horticultural, during which he was advised while discussing

other matters, that the Company would hold him responsible for the charges on these shipments to Jerome Distributing if we could not collect the amounts from Jerome or if he could not help us in collecting the money.

"Q. When did this conversation take place?

"A. That I do not recall—either late in 1932 or around the summer of 1933.

"Q. In other words, as I understand it, you are testifying from memory? Again I ask you whether you have any written request by the Pennsylvania Railroad from Mid-State Horticultural Company for the payment?

Mr. Stammer: To which I make the same objection, that so far as the payment is concerned——

The Court (Interrupting): Oh, I think that it is proper cross-examination. I think the objection should be overruled.

Mr. Roche (Reading):

"A. I have not the information with me.

[fol. 182] "Q. Now, with reference to the check for $7,035.19, you have testified that that amount included six carloads of the merchandise mentioned in the complaint—rather, the freight charges for six carloads—is that true?

"A. Yes.

"Q. In that check was there included the payment of other carloads of merchandise than those six you mentioned?

"A. Yes.

"Q. And were those for freight charges on carloads of merchandise delivered to Jerome Distributing Company, Inc. by shippers other than Mid-State Horticultural Company?

"A. Yes.

"Q. Have those freight charges been paid?"

Mr. Stammer: May we have the same objection that we made to the question on the other?

The Court: Yes.

Mr. Roche (Reading):

"A. Part of them have been paid.

"Q. How much?

"A. Approximately $700.

"Q. With regard to the check for $9,237.11, you testified that the freight charges on seven of the carloads of merchandise involved in this suit were included in this check. Is that true?

"A. Yes.

"Q. And were there freight charges for other carloads of merchandise delivered to Jerome Distributing Company, Inc. included in that check?"

Mr. Stammer: May we have the same objection to that, if the Court please?

[fol. 183] The Court: Yes. Same ruling.

Mr. Roche (Reading):

"A. Yes.

"Q. And those were by shippers other than Mid-State Horticultural Company?

"A. Yes.

"Q. Were those other freight charges paid?

"A. A portion of them.

"Q. How much?

"A. Approximately $650.

"Q. Now, after these three checks had come back did you take any other action with regard to collection of those three checks, except what you have testified to?"

Mr. Stammer: Now, if the Court Please, I object to that on the ground it is irrelevant, incompetent and immaterial.

Mr. Roche: Well, it is proper cross-examination.

Mr. Stammer (Continuing:) And the evidence is incompetent, irrelevant and immaterial. The evidence of subsequent attempts to collect this check would not be either proof of acceptance of the check in payment, or proof of payment, and would not constitute facts in defense of the liability or the duty of this defendant to pay the freight charges.

Mr. Roche: We certainly have a right to develop upon cross-examination——

Mr. Stammer: (Interrupting) It would not be any proof of the fact that there was an express agreement that they accepted the check in payment.

The Court: I don't know what the answers are, here. Objection is overruled.

[fol. 184] Mr. Roche (Reading):

"A. We had a meeting in this office on December 2, 1932.

"Q. Who was present at the meeting?"

Mr. Stammer: Just a moment. May we have the same objection to all these succeeding questions on this line?

The Court: Yes.

Mr. Roche: I am willing to stipulate to that, your Honor, subject to your Honor's approval.

The Court: Yes.

Mr. Roche (Reading):

"A. J. Hamilton Cheston, Assistant General Solicitor, Messrs. Boardman, Adams and Wahl of the O'Brien firm, Mr. Sudborough, General Traffic Manager, J. W. Roberts, Perishable Traffic Manager, H. J. Freeman, Freight Claim Agent, J. L. Hoagland, Agent at Pier 28, Captain Danielson and Lieutenant Wall of the Railroad's Police Department, John Savage, Jr., Chief Clerk of the Treasury Department, and Martin P. Leger, Special Agent of the Treasury Department office in New York.

"Q. Was there any other effort made to collec- the three checks in question?

"A. Yes.

"Q. What was done?

"A. The Railroad obtained a judgment or judgments against Jerome Distributing Company, Inc.

"Q. When?

"A. I haven't that information with me.

"Q. Do you know when suit was instituted on the checks?

"A. No. I can't tell you that, either.

[fol. 185] "Q. Did you receive any notification from your lawyers informing you when judgment was entered?

"A. Yes, we were advised.

"Q. When?

"A. July 15, 1936.

"Q. Did your lawyers advise you that they had obtained a judgment by default against Jerome Distributing Company, Inc. July 9, 1936?

"A. Yes.

"Q. Did they give you the amount of the judgment?

"A. Yes.

"Q. What was the amount?

"A. $21,294.90.

"Q. Now, since November 22, 1932 did you receive any moneys from Jerome Distributing Company, Inc.?

"A. No.

"Q. Did you continue to deliver merchandise to Jerome Distributing Company, Inc. after November 25, 1932?

"A. I can't answer that question.

"Q. Do I understand you correctly that you are unable to find among the records you have with you any written notification by the Pennsylvania Railroad to Mid-State Horticultural Company requesting payment for the freight charges on the twenty-one carloads of merchandise mentioned in the complaint?"

Mr. Stammer: To which we make the same objection to that made to the previous questions covering that line.

The Court: Objection is overruled.

Mr. Roche (Reading):

"A. I can not find any such written notice among the papers I have with me."

[fol. 186] Mr. Roche: I think the rest is redirect.

(Here a recess was taken for 10 minutes, after which, all parties being present, the following proceedings were had and testimony taken, to wit:)

Mr. Stammer:

In view of the Court's ruling on the question of the cross-examination, we will proceed to read the redirect examination. (Reading:)

"Q. Mr. Savage, you have with you all the papers of record of the Treasurer's Department which might include noticed to you from the firm of O'Brien, Boardman, Conboy, Memhard & Early, or its successor firms, with respect to the institution of suit on any of these checks?

"A. No.

"Q. Or with respect to the entering of judgment in connection with any of the suits that might have been brought thereon, other than the judgment concerning which you testified on cross-examination?

"A. Yes. I have a transcript of a letter from the O'Brien firm, dated June 30, 1936 to the effect that judgment had been entered in the amount of $11,283.55 on June 30, 1936

in favor of the Pennsylvania Railroad against Jerome Distributing Company, Inc.

"Q. I ask this question subject to the Court's ruling on my objections on cross examination to the questions of Mr. Silverman with respect to the institution of suit on the checks concerning which Mr. Savage testified— Were you advised, and by you, I mean the Pennsylvania Railroad, of [fol. 187] any earlier judgments taken against Jerome Distributing Company, Inc.?

"A. I can find no such advice in the papers I have with me.

"Q. Do those papers purport to include all information the Pennsylvania Railroad has concerning judgments of record entered by the Pennsylvania Railroad against Jerome Distributing Company, Inc.?

"A. No.

"Q. So that you are not in a position to testify as to whether any previous judgments were entered on behalf of the Pennsylvania Railroad against Jerome Distributing Company, Inc. from the papers you have in your possession presently?

"A. That is correct.

"Q. Or with respect to the proceedings taken thereafter in an attempt to effect collection of such judgments?

"A. No.

"Q. Now, you testified that a certain amount of money was received by the Pennsylvania Railroad in connection with one or several of the shipments covered by the check for $7,035.19, Plaintiff's Exhibit 2?

"A. Yes. That's right.

"Q. How much was that again? The charges on one car amounting to $682.38—was that car among those involved in this suit?

"A. No.

"Q. And was that payment received from Jerome Distributing Company, Inc.?

"A. No, it was not.

"Q. Now, with respect to the check for $9,237.11, Plain- [fol. 188] tiff's Exhibit 5, you testified a certain amount was received by the Pennsylvania Railroad on a shipment originally purported to be covered by that check—is that correct?

"A. That is correct.

"Q. How much was that amount?

"A. $659.58.

"Q. Was that amount received as freight charges on any of the shipments involved in this case?

"A. No.

"Q. Was it received from Jerome Distributing Company, Inc.?

"A. No.

"Q. Am I correct in understanding, therefore, that it was received from a party other than Jerome Distributing Company, Inc. or Mid-State Horticultural Company and not paid for their account?

"A. Yes.

"Q. Now, was it a general practice of the Pennsylvania Railroad to give freight bills with a 'received payment' stamp, or its equivalent, thereon to a person who paid the freight charges by check and who was on the credit list?"

Mr. Roche: That question is objected to on the ground it is incompetent, irrelevant and immaterial, and not responsive to any of the issues in this case.

The Court: I think in view of the other rulings that the objection should be overruled.

Mr. Stammer (Continuing reading):

"A. Yes, that was the general practice when the bills [fol. 189] are returned with the check.

"Q. And was the purpose of that practice to give the person tendering the check some evidence that he had tendered a check in payment?"

Mr. Roche: Same objection, your Honor, and the further ground it is not proper redirect examination.

The Court: The objection is overruled.

Mr. Stammer (Continuing reading):

"A. Yes.

"Q. And any checks received by the Pennsylvania Railroad—were they received subject to collection?"

Mr. Roche: That is objected to, may it please the Court, upon all the grounds heretofore stated, and upon the further ground that it calls for the conclusion of the witness.

The Court: Well, I think it does, and I think we have the facts with reference to those things before the Court.

Mr. Stammer: I think the same evidence was given on direct examination.

The Court: The objection is sustained.

Mr. Stammer: That is all.

Mr. Roche: The recross-examination, your Honor. (Reading):

"Q. Mr. Savage, these depositions are being taken in the office of Conboy, Hewitt, O'Brien & Boardman, is that right?

"A. Yes.

"Q. And the attorneys who represented the Pennsylvania Railroad in the judgments obtained against Jerome Distributing Company, Inc. on the checks you testified to are the same attorneys?

"A. Yes.

[fol. 190] "Q. Mr. Savage, how much did Jerome Distributing Company, Inc., according to your books, owe the Pennsylvania Railroad December 1, 1932?

"A. Approximately $32,000.

"Q. Did you do any other business with that firm thereafter?

"A. Not that I am aware of."

Mr. Roche: That is all.

Mr. Stammer: If the Court please, we will now read the deposition of GILBERT C. FREEAUF, taken before William H. Vogt, a notary public in and for the County of New York, State of New York, on September 7, 1939, in New York City. (Reading:)

"Q. What is your name?

"A. Gilbert C. Freeauf.

"Q. Where do you reside?

"A. 7 Acorn Place, Bronx, New York.

"Q. By whom are you presently employed?

"A. Marine Midland Trust Company of New York.

"Q. What is the address?

"A. The head office is located at 120 Broadway and I am employed at this branch, 207 East 86 Street.

"Q. What is your position?

"A. Assistant Treasurer.

"Q. Were you employed by the National Bank of Yorkville in November, 1932?

"A. I was.

"Q. What was your position with the bank at that time?

"A. Cashier.

"Q. Was that bank at the same address as the present [fol. 191] bank by whom you are employed?

"A. Yes.

"Q. How long had you been Cashier in that bank prior to November, 1932?

"A. I was elected Cashier in the Spring of 1931.

"Q. Is the Marine Midland Trust Company the successor to National Bank of Yorkville as far as this branch is concerned?

"A. It is.

"Q. And did you continue from November, 1932 to be employed by the National Bank of Yorkville and thereafter, by its successor, Marine Midland Trust Company, up to the present, continuously?

"A. I have.

"Q. And during that tmie you were constantly employed at 207 East 86 Street?

"A. Yes.

"Q. Will you describe your duties as Cashier in November, 1932?

"A. In November, 1932 I was what you might call chief executive of the bank, as far as operations were concerned.

"Q. Specifically, did your duties include supervision of checks presented for payment?

"A. Generally.

"Q. What were your duties with respect to checks presented for payment that were eventually not honored by the bank?

"A. I examined each n. g. item before it was returned by the National Bank of Yorkville during the period under question.

"Q. What do you mean by an 'n. g.' item?

"A. An item that would be dishonored for one reason or another by the National Bank of Yorkville.

[fol. 192] "Q. Coming down to this case, on or about November 22 or 23, 1932, was a check of Jerome Distributing Company, Inc. for $10,433.46, payable to the order of the Pennsylvania Railroad and drawn on the National Bank of Yorkville presented for payment to the drawee bank?

A. On November 23, 1932 a check of Jerome Distributing Company, Inc. payable to the Pennsylvania Railroad in the amount of $10,433.46 was presented for payment to the National Bank of Yorkville.

"Q. Was that check paid by the National Bank of Yorkville?

"A. It was not paid on that date.

"Q. Was it paid on any subsequent date?

"A. No, sir.

"Q. By whom was this check presented for payment?

"A. According to a record I have before me, the check was returned by the National Bank of Yorkville to the Chase National Bank, so we assume that it came from the Chase National Bank when it was originally presented.

"Q. Why wasn't the check paid by the National Bank of Yorkville?

"A. On November 23, 1932 the original ledger records of the National Bank of Yorkville covering the account with it of Jerome Distributing Company, Inc. revealed that there were not funds to meet the item.

"Q. What was done with the check thereafter—after its presentation?

"A. It was returned the afternoon of November 23rd, marked 'short'.

[fol. 193] "Q. What does the notation 'short' mean?

"A. Lack of funds, or insufficient funds—that is another way of saying the depositor or drawer did not have sufficient funds to meet the item—that is correct.

"Q. On or about November 22 or 23, 1932 was a check drawn by Jerome Distributing Company, Inc. for $7,035.19 payable to the order of the Pennsylvania Railroad and drawn on the National Bank of Yorkville, presented to that bank for payment?

A. On November 23, 1932 a check of Jerome Distributing Company, Inc. was presented in the amount of $7,035.19. According to the records before me this check was drawn to the order of the Pennsylvania Railroad.

"Q. Was that check paid when presented?

A. It was not, sir.

"Q. Why wasn't the check paid?

A. Because of lack of funds, or insufficient funds on deposit at the time of presentation to cover this item.

"Q. What was the name of the forwarding bank?

"A. From the records before me, it appears that this item came to us from the Chase National Bank.

"Q. Was the check thereafter returned to the Chase National Bank when it was dishonored by the National Bank of Yorkville?

A. It was returned by the National Bank of Yorkville marked 'insufficient funds' on that particular date.

[fol. 194] "Q. On or about November 22 or 23, 1932 was a check of Jerome Distributing Company, Inc. for $9,237.11 payable to the order of the Pennsylvania Railroad and drawn on the National Bank of Yorkville presented to the National Bank of Yorkville for payment?

"A. On November 22, 1932 a check of Jerome Distributing Company, Inc. in the sum of $9,237.11 drawn to the order of the Pennsylvania Railroad was presented at the National Bank of Yorkville for payment.

"Q. Was that check paid by the National Bank of Yorkville?

A. It was not.

"Q. Why wasn't the check paid by the National Bank of Yorkville?

A. On November 22, 1932 there were not sufficient funds to the credit of Jerome Distributing Company, Inc. to honor or pay this item.

"Q. What was the name of the forwarding bank in that instance?

A. Chase National Bank, Franklin Branch.

"Q. What was done with the check after it was dishonored by the National Bank of Yorkville?

"A. It was returned by the National Bank of Yorkville to the forwarding bank marked 'short'.

"Q. And that expression, 'short' in that case is the same as you described it before in connection with another check?

A. That is correct.

"Q. Now, I show you one of the pieces of paper constituting Plaintiff's Exhibit 4 on this deposition, and ask if that is a usual form of notification by the National Bank of [fol. 195] Yorkville in the case of a dishonored check?

A. That was the usual form, exactly the form, we used at that time.

"Q. I show you another paper, which is part of Plaintiff's Exhibit 6, which also bears the heading 'National

Bank of Yorkville in New York', and ask you whether that was the usual form used in returning dishonored paper?

A. That was the usual form used.

"Q. I also show you another paper constituting part of Plaintiff's Exhibit 3, also bearing the heading 'National Bank of Yorkville in New York' and ask you whether that was the usual form of notification of dishonored paper?

A. That was the usual form used by the bank at that time.

"Q. Mr. Freeauf, do you have a record of checks dishonored by the bank, that is, the National Bank of Yorkville, on November 22 or 23, 1932 with you?

"A. I have before me those original records.

"Q. That record which you just handed me and to which you just testified is headed 'Returned Items'; is that correct?

A. Yes, sir.

"Q. That would be the front and the other, the back, is that correct?

A. That is correct.

"Q. Is this an original record of National Bank of Yorkville?

A. They both are original records of the National Bank of Yorkville.

"Q. What do they purport to show?

[fol. 196] A. They purport to show each and every item that was dishonored on the respective dates of November 22 and 23, 1932—of all items the bank refused for one reason or another.

"Q. Does that record include any reference to the three checks concerning which you previously testified?

"A. It does. There is included on these two sheets, dated November 22 and November 23, 1932 the items we have previously mentioned.

"Q. Now, was this record kept by you or under your supervision?

A. It was kept under my supervision.

"Q. Was it made and kept in the regular course of business?

A. It was.

"Q. Was it necessary, in conducting the business of the bank to make and keep records of this character?

"A. It was.

"Q. And it was usual and customary for the National Bank of Yorkville to make a record of this nature of checks that were returned for one reason or another?

"A. It was.

"Q. Were the records kept in the usual course of business?

A. They were.

"Q. Is this a record of original entry?

"A. These are original records of the National Bank of Yorkville.

"Q. Is it the first permanent entry made by the National Bank of Yorkville concerning matters of this character?

[fol. 197] A. It is the only record kept by the National Bank of Yorkville of all items returned for one reason or another upon any respective date.

"Q. When was the record made?

A. The 'returned item' sheet dated November 22, 1932 was made on that day. Returned item sheet dated November 23, 1932 was made on that day.

"Q. Did the person making the record have personal knowledge of the transactions listed therein?

A. Yes."

Mr. Stammer: It is 12 o'clock. Does the Court want to go ahead?

The Court: Well, it evidently will take some more time. We better, perhaps, take a recess.

Mr. Roche: Anything your Honor desires to do. 2 o'clock?

The Court: Make it 2 o'clock, then.

(Here an adjournment was taken until 2 o'clock p. m.)

Afternoon Session

2 p. m.

(All parties being present, the following proceedings were had and testimony taken, to wit:)

Mr. Stammer: Will you read the last question, Mr. Reporter?

(Record read.)

Mr. Stammer: We will, if the Court please, offer the document attached to the deposition, which is Plaintiff's Exhibit 7.

The Court: All right.

[fol. 198] Mr. Stammer: We will offer these two accounting sheets, November 22, 1932, as Plaintiff's Exhibit 7. And now, if the Court please, we will offer the two accounting sheets attached to the deposition as Plaintiff's Exhibit 8, being of November 23rd, 1932, as Plaintiff's Exhibit 8.

The Court: Admit it.

(Copies of Plaintiff's Exhibits 7 and 8 will be found at the end of this transcript.)

Mr. Stammer: (Continuing reading.)

"Q. Turning for a moment to Plaintiff's Exhibit 7, that is, the sheet entitled 'returned items' and dated November 22, 1932, will you kindly explain for the information of the Court whether that sheet shows the disposition made by the National Bank of Yorkville with the check of the Jerome Distributing Company, Inc. for $9,237.11, payable to the Pennsylvania Railroad?

A. On returned items sheet dated November 22, 1932, which is an original record of the National Bank of Yorkville, I hereby testify the check of the Jerome Distributing Company, Inc. in the sum of $9,237.11, drawn to the order of the Pennsylvania Railroad, was returned marked 'short' on that same date by the National Bank of Yorkville.

"Q. What I am trying to get at, Mr. Freeauf,—perhaps I can put it plainer—is, how do you get that information off that sheet? In other words, I would like you to explain [fol. 199] where and under what columns on that sheet the pertinent information is contained.

"A. This sheet, dated November 22, 1932, deemed or called 'returned items', has the following captions at the top of said sheet: 'Name', 'Amount', 'Number', 'Amount', 'Number', 'Bank', 'Branch', 'Depositor', 'Reason Returned', 'Amount'. On the seventeenth line of this sheet, under the caption 'number' appears '74', which represents the bank that the item was received from and returned to; under the caption 'Branch' appears the name 'Franklin', which means 'Franklin Branch' of the Chase National Bank. Under the caption 'Depositor' is the name of the Jerome Distributing Company, Inc., who were the makers of the item in question. Under the caption 'Reason Returned' appears the word 'short', which is the reason why the

item was dishonored by the National Bank of Yorkville. Under the caption 'Amount' appears the sum of $9,237.11, which is the amount of the item involved. Opposite the amount of $9,237.11 appears 'Penn R. R.', which is a record of whom the item is drawn to or payable to.

"Q. Is that the only information you see on that sheet in connection with that particular item?

"A. That is the only place that the item is listed on this sheet.

"Q. Now I show you plaintiff's Exhibit 8, entitled 'Returned Items' and dated November 23, 1932, and ask you [fol. 200] to explain the various notations on that sheet relating to checks payable to the Pennsylvania Railroad and drawn by Jerome Distributing Company, Inc.?

"A. Sheet dated November 23, 1932 called 'Returned Items' is in substance the same as the sheet previously testified about, dated November 22, 1932. On line 23 on sheet dated November 23, 1932, Plaintiff's Exhibit 8, under caption 'number' appears '74', which happens to be the Chase National Bank. '74' represents the name of the bank that sent the item in question to the National Bank of Yorkville for payment and also represents the bank that the item was returned to by the National Bank of Yorkville. Under the caption 'Branch' appear the numbers '37', which is the number of the branch of the Chase National Bank that the item would eventually be returned to. Under the caption 'Depositor' appears the name Jerome Distributing Company, Inc., who are the makers of the item in question. Under the caption 'Reason Returned' appears the word 'short', which is the reason the National Bank of Yorkville returned said item. Under the caption 'Amount' appears the sum of $7,035.19, which is the amount of the check in question. Opposite the sum of $7,035.19 appears 'Penn R. R. Co.', which is the name of the company the item was payable to. On line 24 on sheet dated November 23, termed 'Returned Items' appears under the caption [fol. 201] 'Number', '74', which is the name of the bank that the item was received from and returned to. Under the caption 'Branch' appears the number '37', which is the branch of the Chase National Bank that the item originally came from and would eventually be returned to. Under the caption 'Depositor' appears the name of Jerome Distributing Company, Inc., who are the makers of the item

in question. Under the caption 'Reason Returned' appears the word 'short', which is the reason why the item in question was refused and returned by the National Bank of Yorkville. Under the caption 'Amount' appears the sum of $10,433.46, which is the amount of the item in question. Opposite the sum of $10,433.46 appears 'Penn R. R. Co.' which is a record of whom the item in question was payable to."

Mr. Roche: Now, if your Honor please, we have the cross-examination of this witness by Mr. Silverman. (Reading.)

"Q. Mr. Witness, when was the Jerome Distributing Company, Inc. account closed?"

Mr. Stammer: To which we object, if the Court please, on the ground it is incompetent, irrelevant and immaterial.

Mr. Roche: Well, it all is certainly cross-examination.

Mr. Stammer: Completely immaterial, because——

The Court: (Interrupting.) I think it would be immaterial, but if it is no worse than that it would not hurt anything.

Mr. Stammer: Well, it wouldn't affect the fact that the check was returned.

[fol. 202] Mr. Roche: Well, that depends altogether, if your Honor please, upon the testimony given by the witness upon direct. Now, they felt that the testimony on direct was material, and certainly we have a right to cross-examine the witness.

Mr. Stammer: I think a question of this sort does not involve the direct examination of all, does not involve whether the check was or was not paid, but only whether the account was closed and other matters of that sort, which do not affect the refusal to pay the check.

Mr. Roche: The purpose, if your Honor please, obviously was to ascertain whether, at a later date, the check was actually—whether any of these checks were actually cashed; and with that object in view the cross-examining counsel undoubtedly wanted to find out when the account of Jerome Distributing Company was closed.

The Court: Well, if you can show that, perhaps that would be material. All right. Objection is overruled.

Mr. Roche: (Continuing reading) "A. The account of Jerome Distributing Company, Inc., was closed some time after June 27, 1933.

"Q. Now, from November 22, 1932 to June, 1933, did Jerome Distributing Company, Inc., make deposits with your bank?"

Mr. Stammer: May we have the same objection to all this cross-examination, your Honor?

The Court: Yes. I think that may be understood.

Mr. Roche: Yes, your Honor. (Continuing reading.)

[fol. 203] "A. They did, sir.

"Q. What was the credit balance on November 22, 1932, of Jerome Distributing Company, Inc.?

"A. At the close of business November 22, 1932 the account of Jerome Distributing Company, Inc., was overdrawn to the extent of $3.42.

"Q. What was the credit balance on November 23, 1932, if any?

A. There was no credit balance. The account was overdrawn then, also.

"Q. Following it down daily, will you give us the credit balances?

A. The first credit balance in favor of Jerome Distributing Company, Inc., appears to be under date of December 31, 1932, when there was the sum of $38.93 to their credit at the close of business December 31, 1932. Up to November 22, 1932, the account of Jerome Distributing Company, Inc., appears to be continuously overdrawn on the books of the National Bank of Yorkville.

"Q. To what extent was it overdrawn?

"A. Various amounts—from day to day it increased.

"Q. What was the largest amount?

"A. At times it was overdrawn to the extent of a few thousand dollars.

"Q. What do you mean 'overdrawn'?

"A. An overdraft on the books of the bank indicates that the account is actually overdrawn and that the party overdrawn owes that sum to the National Bank of Yorkville.

"Q. You mean that you paid out checks that were pre-[fol. 204] sented of the Jerome Distributing Company, Inc., where they had no balance in the bank?

"A. There were times when the National Bank of Yorkville honored certain checks of Jerome Distributing Company, Inc., which overdrew the account.

"Q. Was it ever overdrawn to the extent of $10,000?

"A. From what date?

"Q. From October on?

"A. Well, from November 10, 1932, to the close of business, December 31, 1932, the account was overdrawn in excess of $10,000 during the month of November, 1932.

"Q. That means you had paid out checks drawn by Jerome Distributing Company, Inc., where they did not have sufficient funds to meet them to an extent of over $10,000?

"A. The various overdrafts that occurred on Jerome Distributing Company, Inc., were caused by the National Bank of Yorkville honoring checks, notes or other forms of instruments of Jerome Distributing Company, Inc.

"Q. What date in November was Jerome Distributing Company, Inc., overdrawn over $10,000?

"A. November 14, 1932, the account was overdrawn in excess of $10,000. That seems to be the only day the account was overdrawn in excess of $10,000.

"Q. I think you said it was in December, 1932, that Jerome Distributing Company, Inc., first shows a credit balance of $38. From that time to June did Jerome Dis-
[fol. 205] tributing Company, Inc., ever have a credit balance of $8,000 or more?

"A. From December 31, 1932, to June 27, 1933, the balance at no time reached $8,000 on the account of the Jerome Distributing Company, Inc."

Mr. Stammer: Redirect examination, if the Court please, we offer, in view of the Court's ruling on the introduction of the cross-examination to which we objected.

"Q. On November 22, 1932, were any other checks of Jerome Distributing Company, Inc., presented to the bank and dishonored by National Bank of Yorkville?

"A. On November 22, 1932, there appears an item that was returned by the National Bank of Yorkville marked 'short' of Jerome Distributing Company, Inc., for $3,183.54. This item appears to have been returned to the Chemical Bank & Trust Company and, from the records available, is drawn to the order of the Erie Railroad Company.

"Q. On November 23, 1932, were two checks of Jerome Distributing Company, Inc., payable to the Erie Railroad Company for $2,577.28 and $2,525.08, dishonored by the National Bank of Yorkville?"

Mr. Roche: Now, that is objected to, if the Court please, on the ground it is incompetent, irrelevant and immaterial, and not proper redirect examination.

The Court: Oh, I think it is. If the cross-examination is all right, I think this is. Objection is overruled.

[fol. 206] Mr. Roche: Of course, we get back to the direct, then, your Honor.

The Court: All right.

Mr. Stammer: (Continuing reading) "A. On November 23, 1932, according to the Returned Item sheet, the following checks of Jerome Distributing Company, Inc., were returned by the National Bank of Yorkville marked 'short'. The amounts of these items are $2,577.28 and $2,525.08. Both items, it would appear, were payable to the Erie Railroad Company."

Mr. Roche: (After examining paper handed by Mr. Stammer.) I understand, Mr. Stammer, that you are offering this evidence—you are offering only that part of the record in evidence which starts in with—

Mr. Stammer: Yes, that is all right.

Mr. Roche: On page 1 to and including page 3. I am not objecting to this pamphlet upon the ground no proper foundation has been laid but I am objecting to the introduction in evidence of this order, on the ground that it is incompetent, irrelevant and immaterial; it is an order made by the Interstate Commerce Commission, your Honor, relating to the duties, or some of the duties and functions and authorities of the carrier in connection with transportation charges.

Mr. Stammer: If the Court please, it is offered because it is a Commission order respecting the granting of credit [fol. 207] to shippers. In view of the cross-examination, I think it is wise, in which the extending of credit was brought out, I am offering the two pages numbered 1 and 2, because of the word "order" which appears on the back of the pamphlet.

The Court: Very good. The objection is overruled. It will be received.

The Clerk: Plaintiff's Exhibit No. 9.

PLAINTIFF'S EXHIBIT 9

"ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 20th day of January, A. D. 1931.

Ex Parte No. 73

In re Section 3 of the Interstate Commerce Act as Amended by Section 405 of the Transportation Act, 1920, and Act of March 4, 1927.

IT APPEARING, That on November 1, 1928, upon further consideration of the record and petition of the National Industrial Traffic League, this proceeding was reopened for rehearing and reconsideration:

IT FURTHER APPEARING, That said rehearing and full investigation of the matters and things involved have been had and that the commission on the date hereof has made and filed a report on further hearing containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof:

IT IS ORDERED, that the rules and regulations prescribed in the order of June 4, 1920, in the above-entitled [fol. 208] proceeding be, and they are hereby, modified and that the following rules and regulations be, and they are hereby, prescribed to become effective March 10, 1931, and to remain in force and effect until further order of the commission.

The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as hereinafter set forth.

Where retention or possession of freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit period herein specified, may relinquish possession of the freight in advance

of the payment of the tariff charges thereon and may extend credit in the amount of such charges to shippers for a period of 96 hours to be computed as hereinafter set forth.

Where a carrier has relinquished possession of freight and collected the amount of tariff charges represented in a freight bill presented by it as the total amount of such charges, and another freight bill for additional charges is [fol. 209] thereafter presented to the shipper, the carrier may extend credit in the amount of such additional charges for a period of 30 days from the date of the presentation of the subsequently presented freight bill.

Where icing charges are not published in the tariffs at fixed amounts determinable at the time the shipment moves from point of origin, and where freight charges are prepaid and icing charges are to be paid by the consignor, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period herein specified, may relinquish possession of the freight in advance of the payment of the icing charges and may delay presentation of bills for such icing charges for a period not exceeding 15 days after the end of the calendar month during which the charges accrued and may extend credit in the amount of such charges for 15 days from the presentation of the bill for such charges.

Where the amount of demurrage charges is determinable under average agreements made in accordance with tariff provisions, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period, may delay the presentation of bills for such demurrage charges for a period not to exceed 15 days from the expiration of the authorized demurrage period, and may extend credit in the amount of the demurrage charges accruing during the demurrage period for 15 days from the presentation of the bill for such charges.

[fol. 210] Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight, the 48 and 96 hour periods of credit shall run from the first 12 o'clock midnight following the delivery of the freight.

Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the 48 and 96 hour periods of credit shall run from the first 12 o'clock midnight following the presentation of the freight bill.

Every carrier shall present freight bills for all transportation charges except those herein specifically excepted to shippers prior to the first 12 o'clock midnight following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available to the delivering agent of the carrier.

Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time.

Sundays and legal holidays, other than Saturday half holidays, may be excluded from the computation of the periods of credit.

[fol. 211] The mailing by the shipper of valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of these rules. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time. By the commission, division 3.

George B. McGinty, Secretary. (Seal.)

A true copy:

George B. McGinty, Secretary of the Interstate Commerce Commission." (Seal.)

Mr. Stammer: The Plaintiff rests, if your Honor please.

Mr. Roche: Now, may it please the Court, the defendant in this case moves for a nonsuit in this action as to the amended complaint itself, and as to each of the counts contained in this complaint; likewise for a nonsuit as to the alleged causes of action set forth in plaintiff's amended complaint and as to each of the alleged causes of action set

forth in each of the counts contained in plaintiff's amended complaint upon the following grounds:

First, that the amended complaint filed in this action does not state facts sufficient to constitute a cause of action against the defendant.

[fol. 212] Second, that none of the counts contained in plaintiff's amended complaint state facts sufficient to constitute a cause of action against the defendant.

Third, that the Court lacks jurisdiction of the subject matter of plaintiff's amended complaint, and also lacks jurisdiction of the subject matter of each of the counts contained in plaintiff's amended complaint.

Fourth, that the Court lacks jurisdiction over any of the alleged causes of action set forth in plaintiff's complaint, and likewise, over each alleged cause of action set forth in each and every of the counts contained in plaintiff's complaint or amended complaint.

Fifth, that each of the alleged causes of action contained in plaintiff's amended complaint are barred by the provisions of Section 16, Chapter 1, Paragraph 3, of the Interstate Commerce Act, which is commonly known as 49 USCA, or, rather, it is contained in what is known as volume 49 of the United States Annotated Codes — Codes Annotated.

Sixth, that every and all of the causes of action, or any causes of action based by the plaintiff — based upon any and all of the counts contained in plaintiff's amended complaint, or based upon any of the transactions set forth or related in any of the — in each of the — in each and all of the counts contained in plaintiff's amended complaint, have been destroyed by lapse of time. And that none — that no cause of action, or alleged cause of action based upon any of the transactions set forth in plaintiff's complaint, or [fol. 213] based upon any of the counts contained in plaintiff's amended complaint, was in existence or enforceable on the date upon which this action was commenced.

Seven, upon the ground that prior to the commencement of the above entitled action, this court had lost, and therefore had not obtained jurisdiction to entertain here, try, determine, or determine said action or to enter any judgment against the defendant in said action, either upon the

amended complaint or upon any of the counts contained in the amended complaint, or upon any alleged cause of action set forth in plaintiff's amended complaint or in any of the counts contained in that pleading.

Eight, that the alleged waiver of the statute of limitations signed by the defendant, dated October 25, 1935, and which is described in plaintiff's amended complaint, and, I believe, attached thereto as plaintiff's C, is null and void and of no effect, upon each and every of the following grounds, and for each and every of the following reasons:

a. The provisions of Section 16, Chapter 1, Paragraph 3 of the Interstate Commerce Act, 49 USCA, could not legally or otherwise be waived by the defendant;

b. Any cause of action that could exist in favor of the plaintiff against the defendant was destroyed upon lapse of three years from and after the date upon which said cause of action accrued, and could not, therefore, be legally revived by the execution by the defendant of any waiver of the statute of limitations, or any of the provisions of Sec- [fol. 214] tion 16, Chapter 1, Paragraph 3 of the Interstate Commerce Act;

c. That said alleged waiver was and is not effective as against Section 16, Chapter 1, Paragraph 3 of said Interstate Commerce Act, and was and is in violation of the provisions of said Act and the provisions of Section 16, Chapter 1, Paragraph 3 thereof;

d. That the execution of such alleged waiver of the statute of limitations, and the provisions of said Section 16, Chapter 1, Paragraph 3 of the Interstate Commerce Act could not legally revive any cause of action which became destroyed upon the lapse of three years from the date upon which said cause of action accrued;

e. That Section 16, Chapter 1, Paragraph 3 of said Interstate Commerce Act constitutes a limitation upon the right to institute an action by a carrier for the recovery of transportation charges, and that such limitation upon such right can not be waived by the individual or entity against whom such right exists;

Also upon the ground that the evidence in this case discloses without conflict that the plaintiff in this case looked to the credit of the Jerome Distributing Company for the payment of its transportation, or freight transportation charges, and which, of course, includes freight, demurrage,

handling and refrigerating charges and so forth, and did not look to the defendant in this case, and that it relied upon the credit of the Jerome Distributing Company, and that, [fol. 215] in payment of these freight charges, transportation charges, it accepted checks from the Jerome Distributing Company; and that from all of the evidence in this case it is obvious that an agreement had been established, existing between the plaintiff on the one side and the Jerome Distributing Company upon the other, that the checks which were — which, the evidence discloses, were delivered to the plaintiff in this case by the Jerome Distributing Company, should be regarded and relied upon as payment of these transportation charges; that at no time did the plaintiff in this case ever rely upon the defendant in this case for the payment of those transportation charges, and certainly did not rely upon either the liability or the credit of the defendant in this case at the time it delivered the cars to the Jerome Distributing Company containing the freight which is the subject matter of plaintiff's amended complaint, and each of the counts contained in that complaint.

Now, I want to say this, your Honor, — your Honor stated the other day you did not care to have this case orally argued, and because this motion goes to the very meat of this litigation, if your Honor is still of the same opinion, and your Honor will prefer to have this case briefed, even after those briefs come in, your Honor may desire to hear oral argument; I'd suggest your Honor reserve a ruling upon this motion, and your Honor can determine it when your Honor determines this case, if that is agreeable to Mr. [fol. 216] Stammer.

The Court: Yes, that is agreeable to the Court.
Mr. Stammer: Yes.
Mr. Roche: All right. Will you take the stand?

Arpaxat Setrakian, called as a witness on behalf of defendant and being first duly sworn, testified as follows:

Mr. Roche:

Q. Mr. Setrakian, where do you reside, please?
A. In Fresno.
Q. How long have you resided in Fresno?
A. Oh, some thirty years.

Q. What is your business or occupation?

A. I am engaged in the growing, packing and shipping of grapes.

Q. Are you an officer of the defendant in this case, Mid-State Horticultural Company?

A. I am.

Q. What particular official and position do you hold in that—in that particular corporation?

A. I am vice president and general manager.

Q. During the months of October, November and December of 1932 were you then an official connected with the defendant?

A. Yes, sir, I was.

Q. What was your official position with the defendant during those three months?

A. Vice president and general manager.

Q. Have you, continuously, since December, 1932, been the vice president and general manager of the defendant? [fol. 217] A. Yes, sir.

Q. And you were such vice president and general manager during the shipment of the various carloads of grapes which constitute the subject matter of this particular case?

A. Yes, sir.

Q. Is that correct? Now, state, if you will, please, whether at any time during the latter part of 1932 you were in New York?

A. No, sir, I was not.

Q. When, for the first time, did you visit New York after December—after October, November and December, 1932?

A. February 12, 1933.

Q. Now, state if you will, please, when, for the first time you were advised that the transportation charges connected with the shipments described in plaintiff's amended complaint on file in this action, were paid by the Jerome Distributing Company—were paid or were purported to have been paid by the Jerome Distributing Company to the plaintiff in this case by check or checks.

Mr. Stammer: To which, if the Court please, we object on the ground it is incompetent, irrelevant and immaterial, the plaintiff in the case having no duty to advise the defendant of the nonpayment of the freight, and any lack of such notice not being a defense to an action for freight charges under the bill of lading which was executed by the defendant.

Mr. Roche: Your honor will recall the witness testifying to when, for the first time, any notice was given to the Mid-[fol. 218] State, or any demand made upon them respecting these alleged unpaid charges, or when for the first time any demand was made upon the defendant for the payment of these transportation charges. I am examining this witness at this time, your Honor, merely in response to the testimony contained in that deposition. Your Honor will remember, Mr. Savage said that—as I recall his testimony—that from his recollection, the first mention that was made to defendant in this case was the fact these charges—that it was claimed these charges had not been paid, was at a meeting held in New York during the latter part of 1932 or early part of 1933. I want to fix the date of that conference and show when the information first came to this witness.

Mr. Stammer: We objected to the same evidence offered on cross-examination by Mr. Savage.

Mr. Roche: May I have that last exhibit, please?

Mr. Stammer: My position then was that the evidence could not possibly be relevant or competent or material to any defense in this case.

The Court: It appears to me that this witness should be permitted to testify to the time when that information was conveyed to him.

Mr. Roche: May I say this before your Honor—although I understand your Honor is about to overrule the objection

---

The Court: I was about to.

Mr. Roche: I want to call your Honor's attention to the [fol. 219] last exhibit put in evidence here, that is, the order of the Interstate Commerce Commission, Plaintiff's Exhibit —I think it was number 9. (Reading:) "The mailing by the shipper of valid checks, drafts or money orders, which are satisfactory to the carrier in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of these rules. In case of dispute as to the time of mailing, the post mark shall be accepted as showing such time." I invite your Honor's attention to that language which I only read in the last few moments, for the purpose of pointing out to your Honor that under the regulation of the Interstate Commerce Commission itself, the commission recognizes that a carrier has the right, in certain circumstances, to accept a check or

checks in payment of transportation charges; and our contention is, may it please your Honor, and will be, when we come to argue this question if we deem it necessary, that under certain circumstances, including the circumstances disclosed by the record in this case, that not only was the railroad company justified in relying upon the line of credit which it had undoubtedly furnished to the Jerome Distributing Company, but, likewise, had a right to rely upon the checks which it received from that company, and which in our—as we understand this case, it accepted in payment of these charges.

Mr. Stammer: If course, if the Court please, the Court [fol. 220] will assume that such checks are valid checks.

The Court: That is true.

Mr. Stammer: I don't think that would make the testimony any more relevant. However, the Court has ruled.

The Court: All right. Objection is overruled.

Mr. Roche: May I have that question read to the witness, please?

(Question read.)

A. June 26, 1933.

Mr. Roche:

Q. You were present in court when the testimony given by Mr. Savage during the taking of his deposition was read?

A. Yes, sir.

Q. You recall the conference to which he referred while testifying, during the taking of that deposition?

A. Yes, sir.

Q. When did that conference occur?

A. June 23, 1933.

Q. That, as I understand it, was the first time that you ever heard of this claim made by the plaintiff that the charges had not been paid?

A. That is right.

Mr. Stammer: Same objection, if the Court please. Same ruling.

Mr. Roche: Now, do you know— did you know a man by the name of J. W. Roberts?

A. Very well.

Q. Who was connected with the plaintiff in this case?

A. Yes, sir.

Q. Where was Mr. Roberts located— that is, where was his office located?

[fol. 221] A. Mr. Roberts' office was located on Pier 22, I believe, of—where the Pennsylvania Railroad Company had its district offices.

Q. When you say his office was located upon this pier, are you referring to the time—are you referring, among others, to the months of October, November and December, 1932?

A. Yes, sir; it has been there all the time.

Q. All right. Now, state if you know whether he had any official position with the plaintiff in this case, that is, the Pennsylvania Railroad Company?

Mr. Stammer: Objected to, if the Court please, on the ground it is a pure conclusion of this witness.

Mr. Roche: I am asking if he knows, your Honor.

The Court: Yes.

A. Oh, yes; Mr. Roberts was general traffic manager in charge—general traffic manager of perishable commodities that came into the New York district, what we call the Manhattan district.

Mr. Roche: That is, for the plaintiff in this case.

A. That is right.

Q. Employed by the plaintiff, is that right?

A. That is right.

Q. Did you, from time to time have transactions with Mr. Roberts in his capacity as traffic manager for the plaintiff?

A. Oh, yes.

Q. Covering how many years?

A. Oh, I'd say not less than 20 years. I am not definite to the number of years, but for many years.

[fol. 222] Q. Well, were any of those transactions in which he engaged repudiated by the railroad company?

Mr. Stammer: To which we object, if the Court please, not proof of any competency or capacity or authority of——

The Court: I can't see its materiality.

Mr. Roche: We would have a right to show, may it please the Court, that the plaintiff in this case acted upon transactions which were engaged in by Mr. Roberts, presumably as its agent, and that no objection was ever made by the railroad company to his acting in that capacity, for the purpose of showing ostensible agency.

Mr. Stammer: I don't think that would be proof of any ostensible agency at all, if the Court please. A man might have no connection with the railroad company—the railroad company might not even know it——

The Court: Objection overruled. I will hear what he says, reserving the right to pass upon the sufficiency at a later date.

A. We looked upon Mr. Roberts as representing the Pennsylvania Railroad Company whenever he made any commitments——

Mr. Stammer: Just a moment, if the Court please.

Mr. Roche: Yes, that answer may go out. What was the character of the transactions in which you engaged with Mr. Roberts? Well, say for a number of years prior to the month of January, 1933?

A. We would approach Mr. Roberts as to the standing of the receivers, as to the credit that they enjoyed with the Pennsylvania Railroad, and whether or not the Pennsyl- [fol. 223] vania Railroad Company deemed the receiver a responsible person to represent us in the city of New York.

Mr. Stammer: If the Court please, we move to strike out the answer on the ground that it is incompetent, irrelevant and immaterial, and not binding upon the plaintiff, no authority has been shown for any such transaction.

The Court: Objection is sustained.

Mr. Roche: Q. Did you from time to time for a period of some years prior to the month of January, 1933, engage in transactions with the plaintiff in this case, the Pennsylvania Railroad Company, which transactions were actually participated in between yourself, representing the Mid-State and Mr. Roberts, representing the railroad company?

A. Yes, we did, on December 6th and 7th—there was a question of cars not being——

Mr. Stammer (interrupting): That is a voluntary statement, and I ask that the answer be stricken.

Mr. Roche: Q. State whether from time to time you took up with Mr. Roberts the settlement of claims which were being made by the Mid-State against the plaintiff in this case.

Mr. Stammer: To which we object on the same grounds.

The Court: I think that is all right. Objection is overruled.

A. May I have the question read?

Mr. Roche: Yes.

[fol. 224] (Question read.)

A. Yes, we did, in 1932, 1931 to 1933.

Q. As a result of negotiations and conferences between yourself, representing the Mid-State on the one side, and Mr. Roberts on the other side, were checks paid by the plaintiff in this case to the Mid-State?

A. The plaintiff in this case would send the checks to Mr. Roberts' office and then it would be turned over to us.

Q. Were there a great many transactions of that character handled between yourself and Mr. Roberts during the period of time to which I have referred?

A. Yes, many.

Q. Now, state whether, on the 7th day of December—I will withdraw that question. State whether during the early part of December, 1933, or, 1932, there was called to your attention some delay in the delivery of freight cars loaded with grapes emanating from the defendant in this case, in connection with their delivery to the Jerome Distributing Company in New York?

Mr. Stammer: To which we object on the ground it is incompetent, irrelevant and immaterial, not addressed to any issue in this case.

Mr. Roche: Just a preliminary question, your Honor, that's all.

The Court: All right. Objection overruled.

A. Yes: On December 6, 1932, I was informed that some of the cars that were attempted to be delivered for sale were [fol. 225] not delivered for sale, and I wanted to know from Mr. Roberts what was the reason, why these cars were not delivered for sale, and Mr. Roberts sent a wire dated December 7th——

Mr. Stammer (interrupting): Which we move the Court to strike on the ground it is not addressed to any issue in this case, incompetent, irrelevant and immaterial.

The Court: Well, I don't—well, to what issues in the case——

Mr. Roche: I simply want to lay the foundation for the offering of the telegram, your Honor, that's all.

The Court: For that purpose the objection is overruled.

Mr. Roche: It is a fact, is it not, that those cars were not the cars that are involved in this particular action?

A. No, sir, they were not.

Q. That is correct?

A. Yes, sir.

Q. I call your attention to a telegram which is dated December 7, 1932, and ask you whether you ever saw that telegram before?

A. Yes, sir. That telegram came to us, the Mid-State Horticultural Company.

Q. When?

A. On the 7th of December.

Q. Is this the original of the telegram that you received?

A. That is right.

Q. Over the lines of the Western Union Telegraph Company, is that correct?

A. Yes, sir.

Mr. Stammer: May I see it?

Mr. Roche: Q. Was that wire sent to you in response to a wire which you sent?

[fol. 226] Mr. Stammer: Just a moment. I don't want the entire telegram described before I have an opportunity to read it.

Mr. Roche: Excuse me. (Handing telegram to Mr. Stammer.)

Q. Was that telegram I have just shown you, dated December 7, 1932, received by you in response to a telegram which you had sent to J. W. Roberts, Pennsylvania Railroad, Pier 29, North River, New York?

A. Yes, sir. The telegram under date of December 7, is an answer to the telegram under date of December 6th, which I sent to Mr. Roberts.

Q. Now, I call your attention to what purports to be a copy of a telegram dated December 6th, 1932, emanating from Fresno, California, addressed to J. W. Roberts, Pennsylvania Railroad, Pier 29, North River, New York, signed Mid-State Horticultural Company, and tell me whether you ever saw the original of that wire before?

A. I have dictated that telegram myself.

Q. When and where did you dictate it?

A. In my office at Fresno on the evening of December 6th.

Q. And that whether—state what became of the original of that telegram after it had been dictated by you and typed by the stenographer?

A. The original was given to the Western Union for dispatch to Mr. Roberts.

Q. All right. I am correct in stating, am I not, that the telegram which I first showed you, which purports to be a wire from J. W. Roberts to the Mid-State Horticultural Company under date of December 7th was the reply?

[fol. 227] A. Yes, sir.

Q. Which you received the next day?

A. Yes, sir, that was the reply.

Mr. Roche: We offer these two telegrams in evidence, your Honor, first, the telegram of December 6, 1932, being a wire from Mid-State Horticultural Company to J. W. Roberts, Pennsylvania Railroad, Pier 29, North River, and the response to that telegram, signed by—purporting to be signed by J. W. Roberts, and addressed to Mid-State Horticultural Company, sent from New York and dated December 7, 1932.

Mr. Stammer: If the Court please, I will object to the telegram of December 6, 1932, that has been offered in evidence by the defendant, on the ground it is incompetent, irrelevant and immaterial, not pertinent or admissible on any defense to the action. The telegram, which I will ask the Court to read, is not one which would indicate payment of the freight; it does not show any fact which could be raised in defense of the liability of the defendant here to pay the freight on those cars. So far as the allegations of the complaint are concerned, in regard to transportation and delivery and execution of the bill of lading and all those matters are admitted, and the complaint is one here of payment. Or, if some other defense, other than payment, which, I think, has not been indicated, except the question of the statute of limitations, now, it is our position that no wire from this defendant to the Pennsylvania, or any wire [fol. 228] in response to it could in any way affect the duty of the railroad to collect this freight, or, the duty of the defendant to pay it; and, estoppel is not available to them

under the law, and this wire, therefore, it seems to me to be totally outside of any issue in the case.

Mr. Roche: I might say to your Honor, so your Honor will understand our position with respect to the wire, which your Honor has now before you, that wire is being offered only for the purpose of showing—establishing a foundation for the next wire which I directed the witness's attention to, being the wire sent by the—sent to the witness by Mr. Roberts. That wire is the material one. This wire here, may it please your Honor, is nothing more or less than to have a foundation for the other wire.

The Court: What do you say to that?

Mr. Stammer: I object to this upon the same ground. There is nothing in this telegram which would have the slightest effect upon the obligation of this defendant to pay these charges. The law is that an attempt to collect from the consignee is not a defense to an action for charges on the part of a person. And there isn't available any estoppel which can be raised, and if there were, so far as this telegram is concerned, which I will show your Honor, it would be incompetent to prove any element of their defense.

Mr. Roche: I am willing to withdraw the wire which I first offered, that is, the wire that was sent by the Mid- [fol. 229] State Horticultural Company to Mr. Roberts under date of December 6, 1932, if no objection is made to the second wire, upon the ground that no proper foundation has been laid; but inasmuch as that objection is being insisted upon, it compels me to offer in evidence the first one, merely for the purpose of laying the foundation for the second.

The Court: Well, I think that this wire might have some effect on some of the contentions made by the defendant. I think I will overrule the objection and take it—admit it in evidence, anyway.

Mr. Roche: I will ask the first wire be marked Defendant's Exhibit A, and the second wire be marked Defendant's Exhibit B. I suppose it may be understood, your Honor, that all these exhibits are actually read in evidence. Your Honor just read these two telegrams.

Mr. Stammer: Yes, it will be stipulated that all exhibits be deemed read in evidence.

DEFENDANT'S EXHIBIT "A"

Western Union

Fresno Calif Dec. 6 1932

J W Roberts
Pennsylvania Railroad Pier 29 North River
New York NY

Brother advises your line refuses bring our cars due embargo Stop Unable understand why embargo now when government reports clearly indicate plenty track facilities available Stop This unnecessary delay subjecting us undue loss please cooperate Stop We are bonded for freight charges and our bond neither canceled nor request [fol. 230] ~~6~~ increase made Stop While unfamiliar with legal ramifications still believe originating and connecting carriers under legal liability to deliver cars final destination and if defecits arise look shipper for payment Stop We now ask that permits be issued on all our cars as delay will mean loss please advise

Mid State Horticultural Co."

DEFENDANT'S EXHIBIT "B"

"Western Union

1932 Dec 7 AM 8 22

FA66 Cak= NewYork NY 7 1106A
Midstate Horticultural Company—
Fresno Calif—

Your brother has made no requests on us for permits Jerome Distributing constantly has made requests and where they have satisfied us charges will be paid when cars are turned over to them Permits have been issued promptly Will see brother today.

J. W. Roberts."

Mr. Roche:

Q. Now, Mr. Setrakian, you recall being present in court, as you have already testified, during the reading of the deposition of Mr. Savage?

A. Yes, s.r.

Q. You recall that upon his—that during his cross-examination Mr. Savage testified that certain freight bills relating to the particular cars and cargoes which constitute the subject matter of the present action, were signed by the Pennsylvania Railroad Company, do you recall that?

[fol. 231] A. Yes, sir.

Q. I think he testified to that not only upon cross- but upon direct. Now, I'd like to have you tell me if you will, please, whether any of those receipted freight bills were received by you, and when I say "by you" I mean by the Mid-State, the defendant in this case.

Mr. Stammer: To which we object, if the Court please, upon the ground it is incompetent, irrelevant and immaterial. An issuance of receipt on a freight bill by the carrier is not a defense to the action, in case they haven't been paid; and there is no defense of estoppel.

Mr. Roche: I understand your Honor to strike that defense out, in our amended answer, but nonetheless, your Honor will recall that this testimony was developed for the first time in this case by the plaintiff at the trial, at the reading of these two depositions, the first being the deposition of Mr. Savage. I am not going to occupy very much time putting in this evidence, I simply want to, if I am permitted to do it, introduce in evidence one of these freight bills, and then have this witness testify from that bill, which is comparable to the other bills, which were presented by the plaintiff, and receipted by the plaintiff.

The Court: Well, there is no question about that, is there?

Mr. Roche: Well, I want to get the freight bill before the court, one of the freight bills before the court, your [fol. 232] Honor, because none of these bills were introduced in evidence during the taking of the depositions. Only take a few minutes.

The Court: All right.

Mr. Roche: I will say this, your Honor, if Mr. Stammer is correct as to the law, even though this evidence comes in here, it will not be harmful to the plaintiff.

Mr. Stammer: I just want my objection for the record. I want it clear that I am objecting also on the ground it would not be evidence of payment, in any event.

The Court: All right. It is understood that all this line of testimony comes in under the same objection and pursuant to the same ruling.

Mr. Roche: May I have that question read, then, to the witness.

(Question read.)

A. Yes, sir.

Q. Now, I call your attention to what purports to be a freight bill upon the stationery of the Pennsylvania Railroad Company, and ask you whether that is one of the freight bills that relates to one of the cargoes involved in this case?

A. Yes, sir, that is one of the freight bills.

Q. Now, I notice that this freight bill, among other things, is marked as follows: Car, initials and number, PFE 71097. PFE 71097 identifies the car, does it not?

A. That is right.

[fol. 233] Q. That is one of the cars involved in this action and one of the cars so identified in the complaint, in the amended complaint, also in the deposition of Mr. Savage?

A. Yes, sir.

Q. I notice also that this freight bill is receipted?

A. Yes, sir.

Q. By the plaintiff. The receipt is dated November 22, 1932?

A. That is right.

Q. The stamp being "Paid Nov. 22, 1932"—I can't read the rest of it. Now, directing your attention to this particular freight bill, how quickly after November 22d, 1932 did you receive this bill?

A. I would say within three or four days after the car was disposed of.

Q. State, if you will, please, whether comparable bills, comparably receipted, were received by the defendant in this case with respect to each of these cars within three or four days after the date on which the receipt—the freight bill was receipted?

A. I believe so.

Q. From whom did the defendant in this case receive these receipted freight bills?

A. The Jerome Distributing Company.

Q. You would testify, would you, that a comparable freight bill, receipted by the plaintiff in this case, was received by Mid-State from the Jerome Distributing Company within three or four days after the receipt was signed?

A. Yes, sir.

[fol. 234] Q. That related to every one of the cargoes that is involved in this case, is that right?

A. Yes, sir, positively.

Q. What, if anything, became of the bills, themselves, or receipted bills, outside of the ones that I have here?

A. I know what become of them. There was some adjustments on breakage, and whenever claims are adjusted by the carrier we return the freight bills back to them. On this car, apparently there was no breakage, so that freight bill remained in the files.

Mr. Stammer: That isn't necessary, Mr. Roche. You can introduce it in evidence if you want to.

Mr. Roche: I simply want to account for the absence of the receipted freight bills, your Honor. In other words, you have none of these receipted freight bills in your possession at the present time?

A. No, sir. They must be either in Pennsylvania's possession, or connecting carrier's.

Q. They were returned by you to the plaintiff in this case?

A. Yes, sir.

Q. With claims?

A. With their claims.

Q. I'd like to have you tell me, if you will, whether between the months of October, November and December, 1932 and the month of June, 1933, when you say for the first time you learned that there was a claim being made by the plaintiff in this base that these charges had not been paid, whether you frequently came in contact with the offi-
[fol. 235] cials of the plaintiff in this case?

A. Yes, sir.

Mr. Stammer: Object to that as incompetent, irrelevant and immaterial, not proof of any defense in the action, and being indefinite, no foundation being laid as to who the parties were, or——

The Court: (Interrupting) I don't think that would be admissible.

Mr. Roche: If your Honor please—that testimony is not admissible, you say?

The Court: I don't think so.

Mr. Roche: The witness answered in the affirmative. I would lay the foundation by showing who they were, but

I could not do it until I found out whether he actually came in contact with them or not. And what I want to show—I'd like to have the record contain this statement, I desire to show that between October, November and December of 1932 and the date of the conference in June, 1933, when the witness learned—when the witness the first time learned that these claims were made by the plaintiff, these charges were not paid by the Jerome Distributing Company, that he did, from time to time, come in contact not only with Mr. Roberts but with other officials of the railroad company in connection with the adjustment of claims being made by the Mid-State against the plaintiff in this case, and that notwithstanding the fact that these claims were discussed, and notwithstanding the fact that in every in-
[fol. 236] stance claims were paid by the Pennsylvania to the Mid-State, nothing was said about any claims on the part of the—on the part of the plaintiff against the defendant, arising out of these transportation charges.

The Court: Isn't that all covered by his testimony?

Mr. Stammer: As far as that is concerned, the testimony would be immaterial, unless counsel, again, is trying to prove something going to the question of estoppel. Either we had to notify him or we did not. He states he wasn't notified. This would be all incompetent, irrelevant and immaterial.

Mr. Roche: I simply want the record to show, may it please your Honor, in connection with the question which I just put to this witness, we make that offer of proof, that is all, and then the objection can run to the question. That is all.

Mr. Stammer: The Court sustained the objection?

The Court: It has.

Mr. Stammer: That is all.

Mr. Roche: That is the case, your Honor. I want to state, I promised Mr. Stammer I'd get through by 3 o'clock.

The Court: It is pretty close to it. It is my suggestion, Mr. Roche, that inasmuch as you base your principal contention on your motion for nonsuit, that you take the burden.

Mr. Roche: I am perfectly willing to assume that, your Honor.

The Court: Is that all right with you?

[fol. 237] Mr. Roche: Does your Honor have any objection to letting me have 15 days to file the brief in this case?

I have to proceed with another trial in San Francisco on Monday.

The Court: I have no doubt it will be more than 15 days.

Mr. Roche: Mr. Stammer, which characterizes his usual generosity, suggests I take 20, instead of 15, your Honor.

The Court: 20, 20 and 10?

Mr. Roche: That will be all right.

The Court: Mr. Roche has to take the burden.

Mr. Roche: I am perfectly willing to file the first brief, your Honor. In fact, after we file that, Mr. Stammer may not want to reply. And, if your Honor please, I had not formally offered this freight bill in evidence. We offer it in evidence now, and ask that it be marked next in number. That will be Defendant's Exhibit C.

Mr. Stammer: We object to it, if the Court please, upon the grounds stated previously.

Mr. Roche: And the objection is overruled?

The Court: Objection overruled.

(Copy of Defendant's Exhibit C will be found at end of this transcript.)

[fols. 238-239] Notice of Appeal omitted. Printed side page 129 ante.

[fols. 240-241] Notice to Clerk to Prepare Papers for Record on Appeal Pursuant to Section 953-a of the Code of Civil Procedure Omitted. Printed side page 131 ante.

[fol. 242] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 243] [File endorsement omitted.]

[fol. 244] IN SUPERIOR COURT OF FRESNO COUNTY

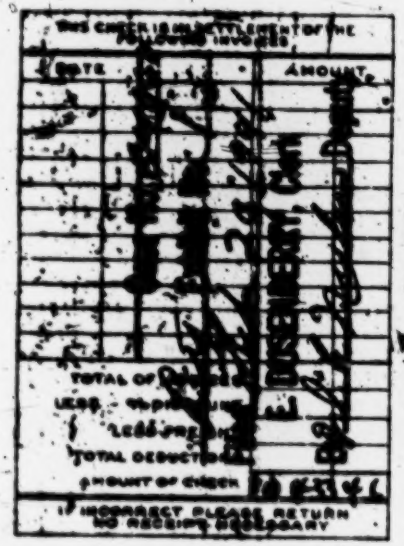
JUDGE'S CERTIFICATE

STATE OF CALIFORNIA,
County of Fresno, ss:

I, H. Z. Austin, Judge of the Superior Court of the State of California, in and for the County of Fresno, do hereby certify that no objection having been made to the foregoing transcript within five days after the receipt thereof by myself, I do certify the same to be true and correct, and it is hereby settled and allowed.

Dated at Fresno, California, this 23 day of June, 1941.

H. Z. Austin, Judge of the Superior Court.



Jerome Distributing Co., Inc.
COMMISSION MERCHANTS
66 HARRISON STREET

No. 7701

NEW YORK Nov. 17 1932

PAY TO THE ORDER OF Pennsylvania Railroad Co $1433 46/100 DOLLARS

Jerome Distributing Co., Inc.

NATIONAL BANK OF YORKVILLE
IN NEW YORK, N.Y.

1-763

J Fishtelley PRES. SEC'Y.

PLAINTIFF'S EXHIBIT 1

PLAINTIFF'S EXHIBIT 2

246

Jerome Distributing Co., Inc.
COMMISSION MERCHANTS
66 HARRISON STREET

No. 7707

NEW YORK Nov. 22 1932

PAY TO THE ORDER OF [illegible] $ 35 11

SEVENTY [illegible] DOLLARS

[illegible] Distributing Co., Inc.

[illegible] BANK
OF [illegible]
IN NEW YORK, N.Y.

1-762

[illegible]

Y

NATIONAL BANK OF YORKVILLE
IN NEW YORK

37

To No. 24

Account Closed	Guarantee of Signature
Attached	Guarantee of Endorsement
Alteration of Date	Guarantee of Amount
Authority for Signing Receipt	Insufficient Funds
Bank Stamp Missing	Irregular
Collateral Endorsement Required	Mutilated
Corporate Title Missing	Missing Endorsement
Customer Signature Missing	No Account
Date	No Instructions to Pay
Do Not Charge Again	Official Signature Missing
Drawn Against Uncollected Funds	Payment Stopped
Endorse as Drawn	Sent us in Error
Endorse in Ink	Signature Incorrect
Endorsement Illegible	Signature Missing
Filing	Signature Unknown
(2)	Signature not Satisfactory

3

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

[redacted] BRANCH NEW YORK [redacted]

[redacted]	WHEN DRAWN	REASON FOR RETURNING	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]

WE HAVE CHARGED YOUR ACCOUNT FOR THE ABOVE ENCLOSED RETURN ITEMS.

PLEASE CALL FOR ADVICE

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

BY _____

To [redacted]

(2)

PLAINTIFF'S EXHIBIT 3

107

247

NATIONAL BANK OF YORKVILLE
IN NEW YORK

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

NEW YORK

[redacted]	[redacted]	[redacted]	[redacted]

WE HAVE CHARGED YOUR ACCOUNT FOR THE ABOVE RETURN ITEMS.

PLEASE CALL FOR SAME

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

BY

TO [redacted]

PLAINTIFF'S EXHIBIT 4

PLAINTIFF'S EXHIBIT 5

104

249

Jerome Distributing Co., Inc.
COMMISSION MERCHANTS
66 HARRISON STREET

No. 7696

NEW YORK, Nov 14 1932

PAY TO THE ORDER OF Pennsylvania Railroad Co

NINE HUNDRED SEVENTY-FIVE AND 00/100 DOLLARS

Jerome Distributing Co., Inc.

NATIONAL BANK OF YORKVILLE
1-963
IN NEW YORK, N.Y.

NATIONAL BANK OF [illegible]
IN NEW YORK

To No. 74

37

(5)

(6)

NOTE TELLER
ADVICE OF DEBIT

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

RETURNS CASES ITEMS — BRANCH — NEW YORK

YOUR LETTER DATE	ON WHOM DRAWN	REASON FOR RETURNING	AMT.
11/[illegible]/22	Wm. Jarvis Dist. Co., Ltd.,	Short	

WE HAVE CHARGED YOUR ACCOUNT FOR THE ABOVE RETURN ITEMS.

PLEASE GIVE FOR PAID

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

BY _____

To The Pennsylvania Railroad Company
S. S. Hoagland, Agent.
Piers 51-52-53,
New York, N. Y.

(5)

250

PLAINTIFF'S EXHIBIT 6

PLAINTIFF'S EXHIBIT 7

RETURNED ITEMS

Name	Amount	Number	Amount	No.	Bank	Branch	Depositor	Reason Returned		Amount	
CERTIFIED CHECKS PAID		**CASHER'S CHECKS PAID**		8			Victoria Coat Co.	Bank stamp		26 12	
[illegible]	147 15	Bond		74			Gentle Market	Dated Nov 23 (Chicago)	✓	15 25	J Caples
[illegible]	100 00			74			Pk. Rolling	" Nov. 20		18 50	Bank collection
[illegible]	200 00			30			Big G Furniture Co	" Nov. 26		20 00	
[illegible]	167 67			30			[illegible]	Ridgway Trust Co. Tribune Natl. Bk.		24 70	
	1508 67			120			[illegible]			10 00	
				2			Victoria Coat Co.	Bank stamp		45 00	
		Rec. Teller		126			Klein Adv. Agency	" "		3 10	
				23			Hagman & Schmidt	" "		25 28	
End.				33			Harry Simon	Date altered		70 10	
H. Witt	Filling	State	57 25	74			Sarah Weisman	Natl. Brent Bank		11 88	
Sterling Garage		Short	50 00	74			Ida Goldberg	Bank stamp		9 00	
[illegible]	Rec'd	Short	21 39	8			Jas. J. Boyle	Maker deceased		8 00	
Ann Garage	Rec'd	Nov. 26	15 00	120			T. Capes & Co.	Ent. as drawn		29 83	
Mr. [illegible]		Short	69 51							324 78	
Sutton Leaf Co.	Dated	Nov	35 24	12			Jerome Det. Co. Inc.	Short		3165 54	Erie N. B.
John [illegible]	Office	Inc.	25 00	74	Franklin		" " " "	"		9237 11	Penn. N. B.
			1023 37	74			Hastings, Schmidt Inc.	"	Charge	2700 00	Sutton Leaf Co.
				126			" "	"	Charge	55 50	[illegible]
		Ref. Items		65			Gillian & Perkins Inc.	"	Charge	486 72	Comp. Gen. Co.
8 Sol Lubitzer		End.	12 85	30	1513-1 Cent.		Andrew B. Bacon	"	Charge	27 20	Alex Stella
120 Rinell Inc Candy Stores		Ag. stopped	11 00	2			Crisp Realty Corp.	"	Charge	80 00	Billy Inc Litch
33 Refrigerator Corp		"	174 55	45			Frances Feist	"	Charge	12 75	Cashier
45 J. Virginia Radio Corp		Ent. as drawn	Short 400 00	2			Gentle Market	"	Charge	61 52	G. G. Brian Inc.
137 Vaughan Art Service		" in ink	10 00	74	Franklin		" "	"	Charge	100 00	R. C. Williams Co.
45 Home Trucking Corp.		" as drawn	26 00	74			Market Table Co. Inc.	Long	Charge	20 00	Louis Rubens
12 Hardy & Randhall		Filling	25 00	30			Harry J. Mathis	Short	Charge	33 67	Jas. Ellis
45 Jagat Stall Fur Co		Ent.	21 00	2			Redcliff Moving & Storage	Items			Cashier
137 Solaire Prod.		" in ink	24 50	30			David Kotler	"	Charge	16 11	M. Radke
8 Wm. McKinley & Sister		Filling	47	45			" "	"	Charge	3 54	N. Y. Times
[illegible]				120			S. Virginia Radio Co.	Short	Charge	33 00	R. W. Smalley
28 Sip Steam Boys. Candy Sales		Ag. stopped	500	424	84 St.		" " "	"	Charge	42 00	Bertram Hall
9 Alexander Freund		Old Indexing	4111	45	Bway		" " "	"	Charge	20 07	E. L. Mc George
			391 48	45			" " "	"	Charge	155 76	Mary Keats
				45	5th Ave.		" " "	"	Charge	155 57	" "
				45 #			[illegible]	[illegible]	Charge	40 00	Edwin Klein
				45	81 St.		Emanuel Lithgow	Gone	Charge	7 50	Hagman & Algus
				5			" "	"	Charge	5000	R. W. Inc. Manhattan
TIME CERT OF DEP PAID		CERTIF. OF DEPOSIT PAID		30			Adolph Steinberg	Short	Charge	1695 3	Atlantic Express Co.
										1745 67	
								Be forwarded		391 48	
										1804 95	

[fol. 255] IN SUPREME COURT OF CALIFORNIA IN BANK

L. A. Pennsylvania R R Co.
18001 Mid-State Horticultural Co. } By the Court:

ORDER TRANSFERRING CASE—Filed September 3, 1941

This cause being within the appellate jurisdiction of the District Courts of Appeal under Sections 4 and 4-b, Article VI of the Constitution, and having been improperly appealed to the Supreme Court:

It Is Ordered that the same be transferred to the District Court of Appeal of the Fourth Appellate District.

Dated: Sept. 3, 1941.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 256] IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

4 Civil No. 2699

THE PENNSYLVANIA RAILROAD COMPANY (a corporation), Plaintiff and Respondent,

vs.

MIDSTATE HORTICULTURAL CO., INC., Defendant and Appellant

OPINION—Filed April 16, 1942

The facts of this case are fairly and clearly stated in the opinion prepared by Mr. Justice pro tem. Schottky and need not be repeated here. He also cites the leading cases on the question presented though we believe a somewhat closer examination of some of them is advisable.

The sole question involved in this appeal is this: Can the limitation provided in subparagraph "a" of paragraph [fol. 257] 3 of section 16 of the Interstate Commerce Act (vol. 49, § 16, U. S. C. A.) be waived by the shipper by a written agreement executed on sufficient consideration be-

fore the statute has run? This sub-section, in effect at the time here involved, provided as follows:

"Sec. 16, par. (3) *Limitation of actions.* (a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

It is too well settled to need citation of supporting authority that, generally, a debtor can waive a statute of limitations either by a sufficient writing or by failure to plead it as a defense to the action against him.

An important exception to this rule is clearly stated in 34 Am. Jur., page 16, as follows:

"A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of [fol. 258] creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. Whether an enactment is of this nature, or whether it is a statute of limitations, should be determined from a proper construction of its terms."

In *Walsh v. Mayer*, 111 U. S. 31 [4 S. Ct. 260, 28 L. Ed. 338], it is held that where a right of action is created by statute and a limitation on the time in which to commence the action is imposed, the limitation is a condition attached to the right itself and is not a part of the law of remedy; that if the remedy "is not asserted within the permitted period, it ceases to exist and cannot be claimed or enforced [fol. 259] in any form." The same conclusions were reached

in *The Harrisburg v. Rickards*, 119 U. S. 199 [7 S. Ct. 140, 30 L. Ed. 358], *Davis v. Mills*, 194 U. S. 451 [24 S. Ct. 692, 49 L. Ed. 1067], and the same rule was announced in *United States Use of Texas Portland Cement Co. v. McCord*, 233 U. S. 157 [34 S. Ct. 550, 58 L. Ed. 893], as follows:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before, and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself. *Pollard v. Bailey*, [fol. 260] 20 Wall. (U. S.) 520, 526, 527, 22 L. Ed. 376, 378; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 756, 30 L. Ed. 825, 829, 7 S. Ct. Rep. 757; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 52 L. Ed. 1096; 28 S. Ct. Rep. 726; *United States Use of Gibson Lumber Co. v. Boomer*, 106 C. C. A. 164, 183 Fed. 726 (Circuit Court of Appeals for the Eighth Circuit.)"

The cited authorities support the foregoing rule stating the exception to the general rule and it should not be necessary to review them in detail here.

It follows that the only question necessary for consideration is whether plaintiff's right of action to recover its bill for freight was created by the Interstate Commerce Act or whether it existed independent of that act.

Counsel for both parties have been diligent in their search of the law and have cited a large number of cases. They agree that the case of *Pennsylvania R. Co. v. Susquehanna Collieries Co.*, 23 Fed. (2d) 499, is the only decided case with facts exactly paralleling those of the instant case. In no other case had the carrier and shipper signed a written contract in which the shipper expressly waived the statute of limitations set forth in the Interstate Commerce Act. While [fol. 261] that case was decided by a United States District

Court, it is entitled to due respect and consideration here as it is the only federal decision on the construction to be given the Interstate Commerce Act where the precise question is presented which confronts us and under exactly similar facts. In that case the court held that the right of action grew out of a contract and was not created by statute. Having reached that conclusion no other result could have been reached than to hold that the bar of the statute had been waived.

While it is true that it is generally held that there is no national common law in the United States in the sense that there is a common law in the various states that have adopted it, this does not mean that the federal Constitution and statutes are to be interpreted without reference to the rules of the common law. Under this theory federal statutory construction has been so closely related to the rules of common law construction that in some cases it has been said that in this respect there is a national common law resting upon national authority.

An instructive case on this question is *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. 24, written by a United States district judge who courageously refused to follow prior hold-
[fol. 262] ings of other courts on this question. That action was brought by a shipper to recover alleged discriminatory overcharges for freight shipped over a common carrier commencing in 1875 and continuing a number of years thereafter so the shipments were made before and after the adoption of the first Interstate Commerce Act on February 4, 1887. The action was commenced on August 25, 1892, and the court held all claims for discriminatory overcharges paid prior to the statutory limitation period barred by the statute. In the course of the opinion it is said:

"In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action, and therefore, in the present case, all shipments made before the adoption of the interstate commerce act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act."

The opinion in the Murray case was expressly approved by the Supreme Court of the United States in *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92 [21 S. Ct.

561, 45 L. Ed. 765], which was a case brought to recover [fol. 263] discriminatory charges alleged to have been wrongfully collected by the common carrier for telegraphic services rendered. It was there said:

"But this question is not a new one in this court. In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 275, 36 L. Ed. 699, 704, 4 Inters. Com. Rep. 92, 96, 12 S. Ct. Rep. 844, 847, a case which involved interstate commerce, it was said by Mr. Justice Brown, speaking for the court:

" 'Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act (24 Stat. at L. 379 chap. 104), railway traffic in this country was regulated by the principles of the common law applicable to common carriers.' " (See, also, *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691 [2 S. Ct. 732, 27 L. Ed. 584]; *United States v. Wong Kim Ark*, 169 U. S. 649 [18 S. Ct. 456, 42 L. Ed. 890]; *Kansas v. Colorado*, 206 U. S. 46 [27 S. Ct. 655, 51 L. Ed. 956].)

The conclusion follows from these cases that unless the Interstate Commerce Act created a right of action in the carrier to collect transportation charges, independent of the common law right of action to recover those charges on its written contract, if there was a bill of lading, or on an [fol. 264] implied contract to pay for the services rendered, if there was no bill of lading, the limitation on the carrier's cause of action affected the remedy and not the right of action where, as here, the shipper had paid no part of the freight charges.

In considering this question it should not be out of place to consider the causes that led up to the enactment of the Interstate Commerce Act and the abuses it sought to correct before adverting to the provisions of the act itself. These are set forth at some length in the case of *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197 [16 S. Ct. 666, 40 L. Ed. 940]. It is there said:

"While shippers of merchandise are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity

MICROCARD
TRADE MARK ®
22
43
MATTHEW BENDER & COMPANY
MB
-63-
2119
microcard

of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of car- [fol. 265] riage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools of combinations with each other, leading to oppression of entire communities.

"Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies, and by general enactments by the several states, such as clauses restricting the rates of toll, and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers,—particularly that one which requires uniformity of treatment in like conditions of service.

"As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations, whose [fol. 266] roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

The opinion goes on to consider the act itself and the conclusion is reached that it was intended to limit the power of the common carriers to fix their rates and to put an end to discriminations among and preferences to shippers. Thus the burden was placed on the carrier and the benefit was given to the shipper. This was recognized in *Central R. Co. of New Jersey v. Anchor Line*, 219 Fed. 716 [136 C. C. A. 388], where it was held that the act was not for the benefit of the carrier but for the protection of the shipper.

A study of the act leaves the conclusion that it lacks appropriate language to create in the common carrier a right of action to collect its transportation charges, where no part of them has been paid, separate and distinct from its common law right to bring such an action. Of course, such right of action is recognized, but hardly created, and [fol. 267] recovery is limited to the rates established by the Interstate Commerce Commission.

The conclusion follows that in a case such as we have here where no part of the transportation charges had been paid and the carrier brings its action to recover all of those charges based on rates established by the Interstate Commerce Commission, the cause of action is one in contract given by the common law to the carrier long before any Interstate Commerce Act was adopted and is not a right of action created by that act. Therefore the limitation in that act does not destroy the right of action by reason of lapse of time, but is merely a limitation on the remedy which may be waived by the shipper.

There is nothing in any of the cases cited to us that in any manner conflicts with this conclusion. With one exception all of those cases were either by the carrier to recover the difference between the rate paid by the shipper and the higher rate fixed by the commission or by the shipper to recover the difference between the rate paid by the shipper and the lower rate fixed by the commission. There was no such right of action known to the common law. The cause of action was created by statute.

[fol. 268] A further ground of distinction between all of those cases and this case rests in the fact that there was no contract waiving the statute between the carrier and the shipper. The time fixed by the statute of limitations had run. The limitation was pleaded. The actions were held barred. No other results could have been expected under those circumstances. By what we have just said we do not intend to intimate that where there has been an under or over payment of the freight rates fixed by the Interstate Commerce Commission; a contract waiving the statute would be given effect. That question is not involved here.

It is at once apparent from this statement that none of those actions could have been maintained at common law. Under the common law the parties were bound by their

contracts, the actions were upon those contracts and the amounts of recovery were fixed by those contracts.

The distinction here made is recognized in the case of *Button v. Atchison, T. & S. F. Ry. Co.*, 1 Fed. (2d) 709, which was an action by the carrier to recover the difference between an undercharge paid it by the shipper and rates fixed by the commission. The court said:

[fol. 269] "It is plain upon these facts that at common law the carrier could not have recovered of the shipper any additional sum as freight. Its right to maintain the present suit is created by the Interstate Commerce Law (Comp. St. § 8563, *et seq.*). It arises out of the provision of that act which requires the carrier to collect, and the shipper to pay, the full charge named in the tariffs filed by the carrier with the Interstate Commerce Commission. *Pittsburgh etc. Ry. Co. v. Fink*, 250 U. S. 577, 581, 40 S. Ct. 27, 63 L. Ed. 1151; *New York Central R. R. Co. v. York & Whitney Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 65 L. Ed. 1016."

The one case cited in which it does not appear that the carrier brought the action to recover the difference between the undercharge paid by the shipper and the rate fixed by the commission is *Galveston H. & S. A. Ry. Co. v. Webster*, 27 Fed. (2d) 765. From the facts set forth in the opinion this question cannot be determined. As the question presented here was not considered there we cannot regard that case as conflicting with the conclusions reached here.

The distinction between the two lines of cases may be briefly summarized. When no part of the freight has been [fol. 270] paid the action is on the contract and is based in the common law and is not created by statute. In those cases the effect of the statute important here is to fix the amount of recovery. When the action is to recover the difference between an undercharge or an overcharge and the legal rates fixed by the Interstate Commerce Commission, the right of action is created by the statute as no such cause of action existed at the common law. In the first case where no part of the freight had been paid the limitation is on the remedy only and does not extinguish the cause of action so it may be waived by the parties to the contract. In the second case where part of or more than the rates established by the Interstate Commerce Commission have been paid, the cause of action is created by

the statute and the limitation is a condition to maintaining the action and lapse of time destroys the right of action.

To advert again to the purposes of the Interstate Commerce Act we quote from *A. J. Phillips Co. v. Grand Trunk Western Railway Company*, 236 U. S. 662 [35 S. Ct. 444, 59 L. Ed. 774], as follows:

"To have one period of limitation where the complaint is filed before the Commission, and the varying periods [fol. 271] of limitations of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discriminations relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier."

If the purpose of the Interstate Commerce Act is to prohibit unjust discrimination by the carrier and to protect the shipper, then certainly the judgment in this case should be affirmed. To do otherwise would be to permit a carrier to give preference to a large shipper by the very procedure here followed. It would not only open the gate but would signpost the way to discriminations and preferences.

Defendant in its brief virtually has conceded that there was no error in sustaining the demurrer to its fourth affirmative defense, so that question need not be considered except to say that under the federal rule governing these [fol. 272] actions it seems to be established that there cannot be an estoppel against the collection of freight charges that will result in discriminations or preferences which will amount to rebates of legal freight charges.

The judgment is affirmed.

Marks, J.

Barnard, P. J., concurred.

DISSENTING OPINION

Appellant shipper appeals from a judgment in favor of respondent railroad company in an action to recover transportation charges for grapes shipped by appellant during

the 1932 season from points in Fresno County, California, to a consignee in the city of New York. There is little dispute as to the facts and I will summarize them briefly.

During October and November, 1932, appellant, as shipper and consignor, shipped from points in Fresno County over the various lines of connecting railroads, including those of respondent, a number of cars of fresh grapes, which were consigned to and delivered to the consignee Jerome Distributing Company (hereinafter called Jerome Company). None of the transportation charges were prepaid. At the time of the delivery of the grapes, the transportation charges were neither demanded by respondent [fol. 273] nor paid by the Jerome Company. On November 19, 21 and 22, 1932, the Jerome Company delivered to respondent three checks covering the transportation charges involved in this action, and other items not involved here, and respondent receipted the freight bills and delivered said receipted bills to Jerome Company which, within a few days thereafter, transmitted them to appellant. These checks were not paid and respondent endeavored unsuccessfully to enforce payment on them from the Jerome Company. Appellant did not learn until the summer of 1933 that the Jerome Company had failed to meet the transportation charges. Shortly before the expiration of three years after delivery to Jerome Company of the various shipments of grapes, demand was made upon appellant for the unpaid transportation charges and litigation threatened unless payment was made. In order to enable appellant to make such investigation as it deemed essential with respect to the basis of respondent's claim, and to avoid the immediate commencement of the threatened action, appellant, on October 25, 1935, signed and delivered to respondent an extension of time for the bringing of such action. This agreement recited that appellant [fol. 274] agreed that respondent was urging against appellant a claim for certain specified transportation charges; that respondent proposed to bring suit against appellant; that appellant desired additional time to investigate and consider the claim, and requested respondent to withhold filing suit until January 1, 1936; that respondent, in the hope that appellant would conclude to pay without litigation, was willing to defer commencement of suit until January 1, 1936; and said agreement then concluded as follows:

"Now, therefore, in consideration of the forebearance of The Pennsylvania Railroad Company to bring such a suit against the Mid State Horticultural Company, Inc., prior to October 28, 1935, the said Mid State Horticultural Company, Inc., hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an action, it, the said Mid State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.

"This agreement is not an admission of the alleged debt by the Mid State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid [fol. 275] State Horticultural Company, Inc., may have to said claim."

Appellant notified respondent prior to January 1, 1936, that it would not pay said transportation charges and the action was filed on December 31, 1935.

Appellant in its amended answer to the amended complaint set up the provisions of section 16(3) (a) of the Interstate Commerce Act, contending that the three-year lapse of time before suit was commenced destroyed the right asserted by respondent to recover the transportation charges, and deprived the court of jurisdiction, notwithstanding the agreement hereinbefore referred to; and appellant further set up in its fourth affirmative defense the facts relied upon by it to establish that respondent, by its silence respecting the Jerome Company's failure to meet the transportation charges, which silence continued during the period in which appellant ignorantly settled its account with the Jerome Company, estopped respondent to look to appellant for payment thereafter. The trial court sustained respondent's demurrer to the fourth affirmative defense and granted respondent's demurrer to strike out said defense.

[fol. 276] Appellant's principal contention is that the trial court erred in giving effect to the extension agreement of October 25, 1935, which, appellant contends, "was void and of no effect and could not and did not serve to avoid the operation of the limitation provision of the Interstate Commerce Act, which upon the expiration of the three-year period, destroyed the liability of appellant and deprived the court of jurisdiction of this action." Appellant contends further that "irrespective of how our primary contention that the action is governed by the limitation of

section 16(3) (a) may be determined upon this appeal, the inconsistency between the trial court's conclusion with respect to that proposition and its exclusion of the defense of estoppel must compel a reversal of the judgment, so that if, as the trial court necessarily held, the action was not barred by limitation, the defendant and appellant may be afforded an opportunity to establish the defense of estoppel."

By the enactment of the Interstate Commerce Act, Congress assumed exclusive jurisdiction over interstate carriers and shipments. As was said by the Supreme Court of the United States in the case of *Adams Express Co. v.* [fol. 277] *Croninger*, 226 U. S. 491 [33 S. Ct. 148, 57 L. Ed. 314]:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of a carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

And as stated by our own Supreme Court in *New York Central R. R. Co. v. Frank H. Buck Co.*, 2 Cal. (2d) 384 [41 P. (2d) 547]:

"'The shipments being interstate, the rights and liabilities of the parties are governed by the acts of Congress as interpreted by the federal tribunals. (*Cincinnati N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319 [36 S. Ct. 555, 60 L. [fol. 278] Ed. 1022, L. R. A. 1917A, 265].)'"

It is apparent from the act itself and from the decisions rendered since its enactment, that the principal purposes sought to be achieved by the enactment of the Interstate Commerce Act were to secure just and reasonable charges for transportation, to prohibit unjust discrimination in the rendition of like services under similar circumstances and

conditions, and to prevent preferences to and discriminations among persons, firms, corporations and localities.

As was well said in the case of *L. M. Kirkpatrick Co. v. I. C. R. Co.*, 190 Miss. 157 [195 So. 692]:

"The outstanding purpose of the Commerce Act was to absolutely uproot and destroy all discriminations in interstate commerce, regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished. To that end the carrier is without power to waive any valid provision of the contract constituting a defense."

Appellant's position is as follows: First, respondent's cause of action is one created by the Interstate Commerce Act, and as such is destroyed by the lapse of time provided [fol. 279] in section 16, paragraph (3) (a). Therefore, it is beyond the power of the parties to waive those provisions, and the court lacked jurisdiction to enforce payment of the freight charges. Respondent's answer to this argument is that the cause of action is not one created by the Interstate Commerce Act, but is a common law action based upon a contract of shipment between the parties; that as to such a cause of action, section 16, paragraph (3)(a), is a mere statute of limitations and may be waived.

Appellant's second position is that to permit a waiver of section 16, paragraph (3)(a), invites discriminations and preferences, and therefore any such attempted waiver is illegal and void. Respondent's answer to this argument is that the agreement resulted in no discrimination; that if any preference could be said to have resulted from such waiver, it was not an undue or unreasonable preference forbidden by the act; and that to permit appellant thus to entirely avoid payment of the freight charges would result in the most exaggerated and reprehensible type of discrimination which the act seeks to prevent.

We believe it may fairly be stated that the right of a transportation company engaged in interstate commerce to col- [fol. 280] lect its transportation charges existed prior to the Interstate Commerce Act, and that in that sense it was not created by the act, but it must also be stated that a transportation company engaged in interstate commerce cannot enter into a contract for transportation except upon the rates, terms and conditions set forth in the act, and that the act, and every part thereof, must be consi-ered a part of the contract.

In the case of *Chicago & N. W. Ry. Co. v. J. I. Case Plow Works;* 173 Wis. 237 [180 N. W. 846], the court said:

"The right to private contract between shipper and carrier is wholly abrogated by the Interstate Commerce Act, and the rates fixed by law are enforceable by the carrier by force of law."

And in *Chicago I. & L. Co. v. Peterson,* 168 Wis. 193 [169 N. W. 558], the court said:

"The relations between common carriers and shippers are no longer mere matters of contract, but are fixed by the laws and rules regulating such interstate commerce and partake of the nature of statutory obligation." (Citing cases.)

We are, therefore, unable to agree with the respondent's contention that respondent's cause of action is not one created by the Interstate Commerce Act but is a common-[fol. 281] law action of shipment between the parties, because it is clear to us that under the authorities the cause of action as it existed and as it must necessarily be enforced, was one created by said act. But whether it is considered that the cause of action is one at common law, or is one created by the Interstate Commerce Act, we think it must be conceded that section 16(3) (a) of the act applies to this action, because it is certainly an action at law by a carrier, subject to the act, for the recovery of its charges.

One of the things that we must decide is the proper interpretation of section 16(3)(a) which reads as follows:

"All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

If said provision is a mere statute of limitations, then, in accordance with the general rule that such a statute may be waived, it must be held in this case that appellant by said written waiver extended the time for filing the action. If, on the other hand, the section must be construed to mean that upon the expiration of three years from the delivery of the shipments involved, the right to collect [fol. 282] charges thereon was utterly destroyed by operation of the section, and thereafter the court lacked jurisdiction to enforce the payment of such charges, then such

written waiver could not confer jurisdiction upon the court, and appellant would not be estopped from relying upon such defense by reason of such waiver.

In construing and interpreting the statute, the purpose sought to be accomplished must always be kept in mind, and the various provisions of the statute should be construed and interpreted with due regard to the manifest purpose of the entire statute. In the construction of an act of Congress we must, of course, look to and be guided by the decisions of our federal courts, and we will therefore refer to a number of such decisions.

Before doing so we think it proper to state that while subdivision (a) of paragraph (3) of section 16 is the only part of said paragraph applicable to this case, it is to be noted that with respect to each type of action referred to in said paragraph (3), the same language as to limitation, namely, "within three years * * * and not after," is used except as to time, because some of the decisions that will be referred to deal with other subdivisions of the paragraph.

[fol. 283] In the case of *A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662 [35 S. Ct. 444, 59 L. Ed. 774], the Supreme Court of the United States said:

"It is argued, however, that under the conformity act (Rev. Stat. §914, Comp. Stat. 1913, §1537), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, *and not after*. Under such a statute the lapse of time not only bars the remedy, but destroys the liability. (*Finn v. United States*, 123 U. S. 227, 31 L. Ed. 128, 130, 8 S. Ct. Rep. 82), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would [fol. 284] have made it illegal for the carriers, either by

silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period."

In the case of *Kansas City Southern Ry. Co. v. Wolf*, 261 U. S. 133 [43 S. Ct. 259, 67 L. Ed. 571], the Supreme Court, referring to the Phillips case, *supra*, said:

"True it is that the claim of Phillips & Co. was based upon schedule tariff charges theretofore declared to be unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the Phillips case and reasoning advanced to support it, we think, are applicable to the circumstances of the instant cause. The lapse of time had destroyed any liability by the carrier to the shipper or his assignee for the alleged overcharges, and the demurrer should have been sustained."

In the case of *William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633 [45 S. Ct. 612, 69 L. Ed. 1126], it was said:

"It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the [fol. 285] liability of defendant to plaintiff. (*Phillips v. Grand Trunk Ry.*, 236 U. S. 662, 666, 35 S. Ct. 444, 59 L. Ed. 774; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 642, 38 S. Ct. 408, 62 L. Ed. 914; *Kansas City Southern Ry. v. Wolf*, 261 U. S. 133, 139, 43 S. Ct. 259, 67 L. Ed. 571.) On the expiration of the two-year period, it was as if liability had never existed."

The case of *Galveston, H. & S. A. Ry. Co. v. Webster Co.*, 27 Fed. (2d) 765, was an action by a carrier to recover charges from a shipper and his surety, and the defendants relied upon the provisions of section 16(3) (a). The court said, at page 766:

"The single subject-matter of the suit is the recovery by the carrier of its charges for freight in interstate transport. Its right to sue is given by the Interstate Commerce Acts. The federal law governs. That statute provides something more than a limitation of the time within which suit is to be brought. By its terms, failure to sue within the time fixed absolutely destroys further right of action. There can be no saving exception accorded the surety by

the local law. Principal and surety stand on the same footing in this case. The action is destroyed by the supreme [fol. 286] law. The cause of action no longer exists against either principal or surety."

In the case of *Button v. Atchison, T. & S. F. Ry. Co.*, 1 Fed. (2d) 709, likewise an action by a carrier to recover charges from a shipper, the Circuit Court of Appeals, Eighth Circuit, said at pages 711-712:

"There is another ground upon which the case may be rested. Plaintiff's right of action is given by statute. It was not created for its enrichment but to protect the public against secret rebates and discriminations. It is not a right of contract or of property. The right, therefore, is at all times under the full control of the legislature. It may limit it in any way without impairing any constitutional right of the plaintiff. (Citing cases.) * * *

"As to such a right the time limited for its enforcement is a constituent part of the right itself. The lapse of time not only bars the remedy, but destroys the liability. (*Theroux v. N. P. R. R. Co.*, 64 Fed. 84, 12 C. C. A. 52; *Phillips Co. v. Grand Trunk Ry. Co.*, 236 U. S. 662, 667, 35 S. Ct. 444, 59 L. Ed. 774; *Kansas City S. Ry. Co. v. Wolf*, 261 U. S. 133, 43 S. Ct. 259, 67 L. Ed. 571.)"

[fol. 287] In the most recent case upon this subject, *Wisconsin Bridge & Iron Co. v. Illinois Terminal Co.*, 88 Fed. (2d) 459, the court said:

"As to the third count, which was in the form of the consolidated common counts, the court overruled the demurrer, and the case went to trial on this count before a different judge. The facts were stipulated. Appellant again pleaded the statute of limitations, and the court held that it was estopped from setting up this defense inasmuch as it was at its own request that the question was submitted to the Commission, thereby causing the period to run while it was there pending. Judgment was thereupon rendered in favor of the carrier, and from that judgment this appeal is prosecuted by the shipper.

"Section 16(3) of the Interstate Commerce Act, 49 U. S. C. A. § 16(3), lays down certain rules as to limitations of actions, providing, *inter alia*, that 'All actions at law by

carriers subject to this chapter for recovery of their charges or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.' 49 U. S. C. A. § 16(3)(a). The Supreme Court has in numerous cases construed these limitations as jurisdictional, and held that the lapse of time not only bars the remedy but also [fol. 288] destroys the liability. (See *A. J. Phillips Co. v. Grand Trunk Western Ry Co.*, 236 U. S. 662, 35 S. Ct. 444, 59 L. Ed. 774; *Kansas City Southern Ry. Co. v. Wolf*, 261 U. S. 133, 43 S. Ct. 259, 67 L. Ed. 571; *William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126; *United States ex rel. Louisville Cement Co. v. I. C. C.*, 246 U. S. 638, 38 S. Ct. 408, 409, 62 L. Ed. 914.) In the last named case, the Court said '* * * the two-year provision of the act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the commission as distinguished from a rule of law for the guidance of it in reaching its conclusion.' This being true, we think that the defense of limitations was not subject to estoppel, and that it could properly be raised by demurrer or plea, and even if appellant had failed to plead it, it would not thereby have conferred jurisdiction upon the court over the claim which had already been barred at the time the action was brought. (Cf. *Pennsylvania R. Co. v. Carolina Portland Cement Co.* (C. C. A.), 16 F. (2d) 760, *Arkansas Fertilizer Co. v. United States* (Com. Ct.), 193 Fed. 667.)" (See, also, *Pennsylvania R. Co. v. Carolina-Portland Cement Co.*, 16 Fed. (2d) 760; *Louisville & Nashville R. Co. v. Cory*, 54 Fed. (2d) 8; *Zang* [fol. 289] *v. Railway Express Co.*, 130 Ohio St. 17 (196 N. E. 901).)

Respondent, in reply to the foregoing authorities cited by appellant, asserts correctly that not one of such cases involves an action by a carrier to recover freight or demurrage charges in which the shipper has waived or extended the provisions of section 16, paragraph (3) (a), and respondent cites the case of *Pennsylvania R. Co. v. Susquehanna Collieries Co.*, 23 Fed. (2d) 499, as being the only decision on the precise facts, and contends that that decision should amount to binding authority upon this court. In view of the fact that practically the entire argument of respondent is based upon this case, we will quote the brief opinion in full:

"WESTENHAVER, District Judge. This cause is before me on defendant's demurrer to plaintiff's petition. Plaintiff's action is to recover demurrage charges. The point urged in support of the demurrer is that paragraph (3), section 16, of the Interstate Commerce Act, as amended by Transportation Act 1920, section 424 (Comp. St. § 8584), requires that all actions at law by carriers subject to that act for the recovery of their charges or any part thereof shall be begun within three years from the time the cause of action accrues [fol. 290] and not after. Plaintiff's action was not commenced within three years. In excuse, it is pleaded that within three years, and before the cause of action was barred, plaintiff and defendant entered into an agreement to waive the defense of the statute of limitations on condition that suit should not be brought within the statutory period, and that this agreement is still open and subsisting. Plaintiff admits that under the Ohio practice the defense of the statute of limitations may be made by demurrer, if, on the allegations of the petition, the statute is applicable.

"Defendant urges that the right to recover demurrage charges is a right conferred by statute, to which is annexed as a condition that suit to recover must be brought within the statutory period, and hence that the right of action is barred, and cannot be prolonged or kept alive by an agreement such as would apply to an ordinary action.

"Upon due consideration, I am of opinion that plaintiff's action to recover demurrage charges is not a right conferred by the Interstate Commerce Act, and is not within the authorities relied on by defendant. On the contrary, I am of opinion that plaintiff's right of action grows out of contract. This is none the less true, even though demurrage charges, [fol. 291] like tariff rates, must be prescribed in a tariff filed with the Interstate Commerce Commission, and cannot be departed from or varied by the parties, either before or after the service is performed. The cases cited, arising under other provisions of the same section, have no application. In those cases the right of action did not grow out of contract, but out of the statute. No right of action existed except until and as the Interstate Commerce Commission made a finding of certain facts.

"In view of this conclusion, it is unnecessary to consider whether a right created by statute, with a condition annexed that it shall be enforced within a limited period, as suits for

wrongful death, or actions on a reparation award of the Interstate Commerce Commission, may be kept alive by a voluntary agreement of the parties. It is difficult, however, to perceive any sound reason why it may not. Certainly none of the cases cited so hold.

"The demurrer will be overruled, and an exception may be noted."

The decision just quoted was rendered by the District Court, Northern District of Ohio. No authority is cited in the opinion and there is no reference to any of the decisions of the United States Supreme Court hereinbefore cited. [fol. 292] The author of the opinion held that the right to sue for demurrage charges was not a right conferred by the Interstate Commerce Act but was a right which accrued out of contract, and that the statute of limitations could be waived. The opinion does not discuss the object intended to be achieved by the statute and emphasized in other decisions. It is worthy of note that this case has not been cited in any subsequent case.

We are convinced from the authorities that the conclusion reached by the court in the Susquehanna case is opposed to the great weight of authority. We believe that it was the intention of Congress in fixing the limitation of "within three years and not after" to guard against the circumvention of one of the chief purposes sought to be achieved by the enactment of the Interstate Commerce Act, namely, the prevention of preferences and discriminations among persons, firms, corporations and localities. We believe further that under the decisions of the United States Supreme Court and various United States circuit courts and district courts, we are compelled to hold that when Congress provided in the Interstate Commerce Act that "all actions at law by carriers subject to this chapter for recovery of their charges, * * * shall be begun within [fol. 293] three years from the time the cause of action accrues and not after," it meant that carriers should not grant preferences for delaying for a long period of time the enforcement of the payment of charges, and therefore intended to provide, and did provide, that unless the action was commenced within the three-year period, the carrier would lose the right to collect them by action. In construing this section we must have in mind the paramount purpose of the Interstate Commerce Act, and when we have

that purpose in mind, that it was an act to protect the public against rebates and discriminations, it is not difficult to understand why the federal courts have, with the single exception of the Susquehanna case, held that the period provided for the commencement of actions thereunder was different from the ordinary statute of limitations created for the benefit of the debtor, who could waive it, because it was simply a matter which concerned the parties to the action.

It may be that in some cases the waiver of the statute will not result in undue or unreasonable preference or discrimination. However, that is a question that goes to the wisdom or policy of the act, and, as was said by Mr. Justice Field, later a justice of the Supreme Court of the United States, [fol. 294] in *Ex parte Newman*, 9 Cal. 502, 520, "It is not for the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution."

We conclude, therefore, that under the provisions of section 16(3)(a), upon the expiration of the period therein prescribed within which action must be taken by the carrier, the cause of action is destroyed and the court's jurisdiction over the matter is terminated; and that neither the carrier nor the shipper can legally waive the provisions of said section, nor extend the period within which an action must be instituted, and that any such waiver or agreement to forebear is contrary to the plain policy of the act and is therefore against public policy and void.

It follows that the trial court erred in giving effect to the extension agreement of October 25, 1935, and in holding that plaintiff was entitled to judgment.

In view of the fact that appellant concedes that under the authorities the trial court was correct in its view that a shipper cannot assert an estoppel against a claim for transportation charges, it is unnecessary to discuss the question [fol. 295] as to whether or not the court erred in sustaining respondent's demurrer to appellant's fourth affirmative defense and in striking out said defense.

In view of the foregoing the judgment should be reversed.

Schottky, J. pro tem., dissenting.

[fol. 296] IN SUPREME COURT OF CALIFORNIA

4 Civil No. 2699

THE PENNSYLVANIA RAILROAD COMPANY (a Corporation), Plaintiff and Respondent,

vs.

MIDSTATE HORTICULTURAL CO., INC., Defendant and Appellant

APPELLANT'S PETITION FOR A HEARING BY THE SUPREME COURT—Filed May 25, 1942

After Decision by the District Court of Appeal, State of California, Fourth Appellate District, and Numbered Therein 4 Civil No. 2699

To the Honorable Phil S. Gibson, Chief Justice, and to the Associate Justices of the Supreme Court of the State of California:

The appellant herein respectfully petitions for a hearing by this court of this controversy after decision by the Dis-[fol. 297] trict Court of Appeal, Fourth Appellate District. Questions of law alone are involved. The decision was by a divided court, two opinions having been filed. The facts, which are without dispute, are substantially narrated in the dissenting opinion which apparently was the first opinion written, for the majority opinion refers to it in the following language:

"The facts of this case are *fairly and clearly* stated in the opinion prepared by Mr. Justice Pro Tem Schottky and need not be repeated here."

The majority opinion further states with reference to the opinion of the dissenting justice that

"He also cites the *leading cases* on the question presented, though we believe a somewhat closer examination of some of them is advisable."

This action was instituted to recover from the defendant, consignor, certain transportation charges arising out of shipments in interstate commerce. Respondent carrier was obligated to collect the transportation charges from the

ultimate consignee (Jerome Distributing Company) located in New York, upon delivery of the shipments, but instead of doing so and in violation of the Interstate Commerce Act, as well as an order promulgated by the Interstate Com- [fol. 298] merce Commission, and without the knowledge of appellant, it delivered the shipments to the consignee, taking from it checks for the charges due. At the time these checks were taken respondent *receipted the freight bills*, delivering them to the consignee who in turn sent them to the consignor. Later, by litigation which resulted in a judgment in favor of respondent, it attempted to enforce payment of the above mentioned checks against consignee but, because of the latter's insolvency, without avail.

Upon the settlement of its accounts with consignee, in the belief that the transportation charges had been paid, appellant allowed it credit therefor. Shortly before the expiration of the period within which an action could be brought to recover such transportation charges, respondent demanded payment thereof from appellant which, to permit it to investigate the basis of the demand, signed a waiver of the statute of limitations, respondent agreeing to defer instituting its threatened action until a date shortly after such period had expired. As a result of its investigation, appellant refused to pay such charges and this action was instituted.

In its defense appellant contended that the waiver of the statute violated the purposes intended to be accomplished [fol. 299] by Congress in enacting the Interstate Commerce Act and was therefore void and, as a special defense, pleaded that because of its conduct and silence respondent was estopped from enforcing payment of such transportation charges against appellant.

Respondent, however, contended that when considering the applicability of the statute of limitations, the right of action should be considered a creature of the common law rather than of the Interstate Commerce Act, but that in passing upon the question of estoppel resort to the Act alone should be had.

The trial court adopted respondent's inconsistent theories and held that the right of action was at common law, and that section 16 of the Act should be construed as a mere statute of limitations and, therefore, could be waived, and that appellant's defense of estoppel was not available to it because of the provisions of the Act.

Preliminarily, we believe it proper to state that this petition could safely be based upon the dissenting opinion alone, for the reason that its reading, including the decisions to which reference is therein made (which are but a few of the [fol. 300] many extant), must convince this court that it should have controlled the determination of the appellate court.

The grounds upon which appellant requests a hearing by this court of this cause, briefly stated, are as follows:

1. That the action is governed by the provisions of the Interstate Commerce Act, and particularly section 16 thereof, as construed and interpreted by the United States Supreme Court, the appellate courts of appeal, and the highest courts of the various states.

2. That upon the expiration of three years from the delivery of the shipments involved, the right to collect the transportation charges was destroyed by the operation of section 16(3)(a) of the Act, which expressly provides that it shall apply to "*all carriers subject to this chapter,*" and therefore the court lacked jurisdiction to enforce payment thereof.

3. That the intent and purpose sought to be accomplished by Congress in passing the Act (implicit in the Act itself), prohibits the waiver of the limitation period prescribed by section 16 of the Act.

4. Whether the pending action is one to enforce a right based upon the Interstate Commerce Act or rising out of [fol. 301] contract is immaterial: Defendant being a carrier subject to the Act in either case upon the expiration of the limitation period, the right of action ceases and jurisdiction is lost.

5. That regardless of all other considerations, it must be held that the Act created a right of action theretofore nonexistent in federal jurisdiction, which Act prescribed the period within which such action had to be commenced, thereby bringing the existing controversy within the exception to the limitation rule recognized by the appellate court in its majority opinion.

6. That if the appellate court correctly held that the right of action was not based upon the Act, but was at common

law, its further holding that under the Act the defense of estoppel was not legally permissible, was unwarranted and constituted a miscarriage of justice by subjecting appellant to double liability.

7. That a rehearing is essential to the end that uniformity of decision upon the important questions involved may be maintained (*W. R. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 59 L. Ed. 774), and that appellant may not be subject to double liability by failure of the trial court to follow well-established legal principles.

[fol. 302] In support of the legal propositions stated, appellant relies not only upon the decisions hereinafter cited, but, likewise, upon the clear and explicit dissenting opinion which, in the judgment of its counsel, contains an exposition of the legal principles involved harmonious with existing controlling authority.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 303] IN SUPREME COURT OF CALIFORNIA, IN BANK

[Title omitted.]

ORDER GRANTING HEARING, AFTER JUDGMENT BY DISTRICT COURT OF APPEAL—Filed June 12, 1942

Appellant's petition for hearing Granted and cause transferred to this Court.

Dated June 11, 1942.

Gibson, Chief Justice; Shenk, Justice; Edmonds, Justice; Traynor, Justice.

[File endorsement omitted.]

[File endorsement omitted.]

[fol. 304] IN SUPREME COURT OF CALIFORNIA

The PENN R. R. Co. *v.* MIDSTATE ETC. Co. -LA. 18001

OPINION—Filed November 27, 1942

"SHENK, J.

This is an appeal from a judgment in favor of the plaintiff for the sum of $13,678.86, representing unpaid freight charges. The defendant was the consignor of interstate shipments of grapes over the plaintiff's and its connecting lines. The complaint was filed more than three years after the cause of action accrued. The plaintiff pleaded a written agreement of waiver of the statute of limitations executed by the defendant. The defendant interposed a demurrer on the ground that the action was barred by the provisions of section 16, paragraph (3)(a) of the Interstate Commerce Act. The demurrer was overruled. In its answer the defendant admitted the execution of the alleged agreement, but denied its validity as an effective waiver of the statute. The action was tried on the issues raised by the complaint and answer. On the findings of fact and conclusions of law judgment was entered in favor of the plaintiff for the amount of the unpaid freight charges and interest. If the court was correct in its ruling on the demurrer, the judgment is supported by the record.

The facts are undisputed. In October and November, 1932, the defendant consigned twenty-one car loads of fresh grapes from points in Fresno County, California, which ultimately were delivered to Jerome Distributing Company as consignee in the State of New York. The latter company on November 19, 21 and 22, 1932, issued to the plaintiff three checks which covered all of the freight items involved in this controversy and for which the consignee, referred to as the Jerome Company, received freight bills receipted by [fol. 305] the plaintiff. The receipted bills were transmitted to the defendant who in turn credited the Jerome Company's account.

In the meantime the checks of the Jerome Company were refused payment by the drawee bank because of insufficient funds. The plaintiff filed an action against the Jerome Company which proceeded to judgment, but nothing was

collected thereon. Toward the close of 1935 the plaintiff made demand on the defendant for payment of the freight charges and threatened action in the event of nonpayment prior to the imminent expiration of the three-year statutory period of limitations. The defendant required time for investigation of the claim. In order to avoid immediate commencement of the action the defendant, on October 25, 1935, executed and delivered to the plaintiff the writing alleged in the complaint by which it assumed to extend for a period of about three months the time within which the railroad company could commence an action for the recovery of the freight charges. The express consideration for the promise on the part of the shipper was the forebearance by the railroad company to bring suit prior to the expiration of the statutory period as extended by the waiver or such earlier time as the shipper should definitely refuse to pay the claim. On December 26, 1935, the defendant shipper definitely refused to pay the freight charges. The present action was commenced on December 31, 1935, which was three years and forty days after the last shipment was delivered.

The question is whether the written agreement of waiver of the statute of limitations is binding on the defendant. The sufficiency of the consideration for the agreement is not questioned.

The answer to the question is controlled by the federal statutes and the federal courts' construction thereof as applied to similar facts. (See New York Central R. R. Co. v. Frank H. Buck Co., 2 Cal. 384; Adams Express Co. v. Croninger, 226 U. S. 491

Section 16(3)(a) of the Interstate Commerce Act [49 U. S. C. A. sec. 16, par. (3)] reads: "All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." In the same paragraph of that section are similar provisions limiting the time within which shippers may file complaints with the commission for recovery of damages not based on overcharges ('within two years from the time the cause of action accrues, and not after'), and for recovery of overcharges ('within three years from the time the cause of action accrues, and not after').

[fol. 306] The only reported decision involving the validity of a written agreement by a shipper to waive such a statute

of limitations is by a federal court and it supports the plaintiff's position. (Pennsylvania R. Co. v. Susquehanna Collieries Co., 23 F. 2d 499.) In that case, decided in 1927 the same plaintiff, Pennsylvania R. Co., brought an action in the United States District Court against Susquehanna Collieries Co. to recover demurrage charges. The action was not begun within the three years limited by section 16, paragraph 3 of the Interstate Commerce Act. In excuse the plaintiff pleaded that within the three-year period the defendant had entered into a written agreement to waive the statute of limitations on condition that suit be not brought within the statutory period, and that the agreement was still in effect. The defendant there interposed a demurrer and argued the same contention which is made by the defendant in this case, namely: that the right to recover charges was a 'right conferred by statute, to which is annexed as a condition that suit to recover must be brought within the statutory period, and hence that the right of action is barred, and cannot be prolonged or kept alive by an agreement such as would apply to an ordinary action.' The district court in overruling the demurrer expressed the opinion that the right of action to recover such charges, as distinguished from a right of action created by the Interstate Commerce Act, grew out of contract, was not necessarily extinguished by the expiration of the statutory period, and could be kept alive by the written agreement of the parties. The court considered that this was so even though the charges must be prescribed in a tariff filed with the Interstate Commerce Commission, and could not be departed from or varied by the parties. The Court said: 'The cases cited, arising under other provisions of the same section, have no application. In those cases the right of action did not grow out of contract, but out of the statute.' It was also pointed out that in none of the cited cases was it held that such a contractural right may not be kept alive by a voluntary agreement of the parties. Apparently no reported case since that time has involved such a written waiver of the statute of limitations. As a consequence the decision of the district court in the Susquehanna case has been neither disapproved nor criticized in the fourteen-year period since its rendition. It is not contended by the defendant that shippers in the meantime have not signed time limitation extension agreements. If they have done so, it may be assumed that they considered them binding pursuant

to the decision in the Susquehanna case, at least until the present litigation.

The defendant nevertheless contends that the decision in the Susquehanna case may not be considered as authoritative in view of language employed in decisions by appellate [fol. 307] courts in the federal jurisdiction. The defendant relies especially on A. J. Phillips Co. v. Grand Trunk Western Railway Co., 236 U. S. 662; Louisville & N. R. Co. v. Cory, 54 F. 2d 8; Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. 2d 459; and Zang v. Railway Express Co., 130 Ohio St. 17 [196 N. E. 901], as contrary to the decision in the Susquehanna case.

Generally, a statute of limitations may be extended or waived. (Wells Fargo & Co. v. Enright, 127 Cal. 669; Tebbets v. Fidelity & Casualty Co. of New York, 155 Cal. 137; 37 C. J. 723, Sec. 41. This general rule governs unless the action is created by statute and the language of definition requires a construction that the cause of action is destroyed by the lapse of the period of limitations provided by the statute. Under that exception to the rule the expiration of the time within which suit must be brought operates to terminate the obligation as well as to bar the remedy. (17 R.C.L. 952.)

In the cases relied on by the defendant the courts were applying the exception to the general rule. In the Phillips Co. case the shipper sought to recover an alleged overcharge —an amount paid pursuant to the contract, but which was in excess of an alleged reasonable rate. Other shippers had commenced a proceeding before the Interstate Commerce Commission to determine the reasonableness of the rate, and the commission had determined that the rate was unreasonable to a certain extent. The shipper, Phillips Co., which had not joined in the proceedings before the commission, brought an action to recover the excess four years after the cause of action accrued. The plaintiff contended that the state statute of limitations applied. It was held that the action should have been brought within the two-year period provided by the Interstate Commerce Act. In connection with the contention that under the conformity act and the Michigan practice the question could not be raised by demurrer the court said 'But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should

be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability * * * To permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discriminations relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defense open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here * * * For when it appeared that the [fol. 308] complaint had not been filed within the time required by the statute it was evident, as a matter of law, that the plaintiff had no cause of action.'

In the case of Louisville & N. R. Co. v. Cory, the plaintiff recovered judgment against the railroad company for breach of the common law duty to furnish cars for interstate transportation of coal. Suit had been brought more than two years after the cause of action accrued. It was urged by the plaintiff that the limitation of the Commerce Act had no application, but that the state enactment applied where the declaration alleged a right of recovery at common law. The court held that the two-year period of the Commerce Act applied 'to all actions involving subject-matter directly covered by the act and as to which the shipper is given the right to file a petition for reparation order with the Commission. * * * The enactment of the statute of limitations prescribing the time beyond which claims may not be asserted against interstate carriers is essentially a matter of regulation of interstate commerce, and the requirement of uniformity of treatment would be defeated by permitting one period of limitation where the complaint is filed before the commission, and the varying periods of limitations of the different states, where a suit is brought in a court of competent jurisdiction,' citing the Phillips Co. case.

In Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., the carrier sought recovery of freight undercharges, that is, the amount over the contract rate which it was required to collect in compliance with the act. The action was brought more than three years after the cause of action accrued.

The defendant pleaded the limitation. It was held that even if the shipper 'had failed to plead it, it would not thereby have conferred jurisdiction upon the court over the claim which had already been barred at the time the action was brought.'

None of the foregoing cases involved an express agreement by the shipper to waive the statute of limitations. The first two were actions by the shipper. The Wisconsin Bridge Co. case, in which the carrier sued for undercharges, involved a statutory cause of action, as distinguished from a contract right. The quoted language of the court was confined to a consideration of an assumed failure to plead the statutory limitation in such a case.

The case of Zang v. Railway Express Co. is of no material assistance to the defendant. There, as in the Phillips Co. and Louisville & N. R. Co. cases, the shipper sued for damages, and the court held that the three-year limitation of the Commerce Act in force at the time the cause of action accrued barred the right of recovery, even though in a later amendment the limitation was omitted. It was said: 'There is a marked distinction between our statute of limitation affecting the remedy only which must be specially pleaded as a defense, and special statutory limitations taking away the right itself. In the latter class, time is [fol. 309] of the essence of the right, and the lapse of the prescribed period in which an action may be commenced wholly extinguishes the right.' It was concluded that the alleged cause of action was of the nature of a right extinguished by the expiration of the statutory limitation.

Language in other cases following those cited is also relied on by the defendant, but none of them involved a written or any waiver of the applicable statute of limitations. Consequently, in no case, except the case of Pennsylvania R. Co. v. Susquehanna Collieries, did it become necessary to distinguish between a contract or common law right and a statutory right, for the purpose of considering the application of the general rule that a statute of limitation may be expressly waived.

The defendant contends that there can be no distinction between common law and statutory liability under the limitation clause of the Interstate Commerce Act. However, the Supreme Court of the United States has had occasion to note the distinction between causes whose existence are controlled by time limiting provisions and causes as to

which the statute is remedial only. It distinguished the two classes in William Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633, wherein it followed the Phillips Co. and other cases in holding that a cause of action for damages against the carrier belongs to the class whose existence is limited by the two-year period provided in the Commerce Act.

In considering the remedies preserved by section 22 of the Interstate Commerce Act the Supreme Court in Pennsylvania Railroad Company v. Puritan Coal Mining Co., 237 U. S. 121, said that the act was both declaratory of existing common law and creative of new causes of action. It made the distinction between a common law right, such as a cause of action for damages for breach of duty to furnish cars of which state courts had concurrent jurisdiction, and created rights such as those which depended on administrative procedure and a preliminary finding by the commission. That case was followed in Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., 242 U. S. 120, 124, where the court reiterated the statement that existing rights and remedies not inconsistent with the act were preserved.

A similar distinction was noted by the Circuit Court of Appeals, Eighth Circuit, in Button v. Atchison, T. & S. F. Ry. Co., 1 F. 2d 709, which was an action by the carrier for undercharges. The action was filed more than three years after the cause of action accrued and the statute of limitations was relied upon by the defendant. The state statute provided for a three-year period of limitation. More than two years after the cause of action accrued the federal three-year statute was enacted. The plaintiff contended that the federal statute enlarged the right. The court stated [fol. 310] that at common law the carrier could not have recovered from the shipper any additional sum as freight; that the carrier's right to maintain the action was created by the Commerce Act; and that the right 'was not created for its enrichment, but to protect the public against secret rebates and discriminations. It is not a right of contract or of property * * * As to such a right the time limited for its enforcement is a constituent part of the right itself. The lapse of time not only bars the remedy, but destroys the liability,' citing the Phillips Co. and other cases. (See, also, Pennsylvania R. Co. v. Miller, 124 F. 2d 169).

The defendant urges that judicial recognition of the waiver agreement would invite discriminatory preference

by carriers, an evel which it was the purpose of the Commerce Act to avoid. Sections 2 and 6 of the act prohibit special rates, rebates, refunds and remissions. Section 3 (1) provides that it shall be unlawful for any common carrier to make, give, or cause any undue or unreasonable preference or advantage in any respect whatsoever. However, the present problem cannot be resolved by a consideration of the question of unreasonable preference granted by the carrier to the shipper.

If we assume that the forebearance by the carrier under the written waiver of the shipper was a preference, and that the question is pertinent in this case, it does not follow that the forebearance under the circumstances was either forbidden or unreasonable. The main purpose of the agreement was not to extend credit to the defendant, but was to preserve the rights of the carrier. There is no justification for a conclusion that under the facts in this case the purpose was abused as a cover for extending an unreasonable preference. Moreover, the remedy for the giving of an unreasonable preference is the recovery of damages by the person discriminated against and who has been injured thereby. (Sec. 8, Interstate Commerce Act, 49 U. S. C. A.). An example is Gamble-Robinson Commission Co. v. Chicago, N. W. Ry. Co., 168 F. 161, where an action was brought by a shipper who had not received the same credit terms accorded other shippers. The court said in that case that the Commerce Act left the carrier free to exercise all the rights and privileges under the common law insofar as they were not rendered unlawful by the act; that the act did not make all preferences or advantages unlawful, and that there was nothing unreasonable in requiring prepayment of freight in the case of one shipper and in extending credit to another. If in the present case the defendant's contention in this respect were to prevail, the result would be that the shipper who has been the recipient of the preference would be deemed injured thereby. Certainly he should not be heard to contend that injury to him has resulted because he is compelled to discharge his liability to pay lawful freight charges—a liability which was created when the shipments were deliv- [fol. 311] ered and has never been discharged. The purpose of the act is to secure equal treatment to all shippers.

It is founded on a sound public policy. But that policy should not permit the favored shipper to urge discrimina-

tion against others for the purpose of enabling it to escape a liability which it was otherwise bound to discharge.

The defendant finally contends that if its waiver of the statute be held sufficient and binding, its defense of estoppel against the carrier should not have been stricken by the court. The alleged estoppel was based on the act of the carrier in receipting the bills for freight when the Jerome Company's checks were delivered to it, and the subsequent crediting of the Jerome Company's account by the defendant on the faith of the receipts sent to it by the Jerome Company. It is the carrier's duty to collect all lawful freight charges. Under the contract here it was the consignor's obligation to pay them. It has been decided that the carrier cannot waive defenses and cannot be estopped (except by the running of the statute of limitations) from performing its duty to collect the charges. (See New York Central R. R. Co. v. Frank H. Buck Co., 2 Cal. 2d 384; Texas & Pacific Railway Co. v. Leatherwood, 250 U. S. 478, 481; Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 197; Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209; Chicago & N. W. Ry. Co. v. J. I. Case Plow Works, 173 Wis. 237 (180 N. W. 846); Chicago, I. & L. Ry. Co. v. Peterson, 168 Wis. 193 (169 N. W. 558); New York, N. H. & H. R. Co. v. California Fruit Growers Exchange, 125 Conn. 241 (5 A. 2d 353), citing Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59, and other cases; Spartan Mills v. Davis, 126 S. C. 312 (119 S. E. 905); L. M. Kirkpatrick Co. v. I. C. R. Co., 196 Miss. 157 (195 So. 692).)

However, as we have noted, a contract to preserve the carrier's right and duty to collect lawful freight charges as against the running of the statute of limitations, when reasonably exercised, serves to prevent rather than create discrimination among shippers, and in our opinion, should not be deemed violative of the language or purpose of the Interstate Commerce Act.

The judgment is affirmed.

Gibson, C. J., Curtis, J., Edmonds, J., Carter, J., Traynor, J., and Spence, J., pro tem., concurred.

[fol. 312] IN SUPREME COURT OF CALIFORNIA, IN BANK

[Title omitted]

ORDER DENYING REHEARING—Filed December 24, 1942

Appellant's petition for rehearing Denied.

Dated: December 22, 1942.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 313] IN SUPREME COURT OF CALIFORNIA

Los Angeles.

No. 18001

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Plaintiff, Respondent,

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., a Corporation, Defendant, Appellant

On appeal from the Superior Court in and for the County of Fresno

JUDGMENT

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Fresno in the above entitled cause, be and the same is hereby affirmed.

Respondent to recover costs on appeal.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing

is a true copy of an original judgment entered in the above entitled cause on the 27th day of November, 1942, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 28th day of December, A. D. 1942.

B. Grant Taylor, Clerk, By L. F. White, Deputy
(Seal.)

[fol. 314] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 207] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. —

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner.

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 22, 1943.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 16th day of March, 1943.

[fol. 208] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

In the Supreme Court
OF THE
United States

APR 12 1943
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1942

No. 913

MIDSTATE HORTICULTURAL CO., INC.,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Mills Tower, San Francisco, California,
Attorneys for Petitioner.

THEO. J. ROCHE,
GEORGE A. STOCKFLETH,
Mills Tower, San Francisco, California,
Of Counsel.

Subject Index

	Page
Petition	1
Summary of point involved	2
The point was presented to California Supreme Court	7
California court's decision is directly contrary to this court's interpretation of the act	11
The petition is timely	13
This court's jurisdiction to hear petition	13
Conclusion	14
Brief in Support of Petition	15
California court misled by a federal trial court decision, into ignoring this court's decisions	15
Unsupported trial court decision in Susquehanna case	16
This court's decisions on the point	17
Sec. 16 of Commerce Act is all embracing and applies to all actions at law regardless of their origin or character	28
Circuit Courts of Appeals decisions following Phillips case decision by this court	22
Alleged waiver of limitation statute void because prohibited by Interstate Commerce Act as a discrimination	31
Conclusion	35

Table of Authorities Cited

Cases	Pages
American Ry. Express Co. v. Shideler (Ind.), 165 N. E. 336	34
Arkansas Fertilizer Co. v. United States, 193 Fed. 667	24
Blodgett Co. v. N. Y. Central, 159 N. E. (Mass.) 45	25
Button v. A. T. & S. F. Ry. Co., 1 F. (2d) 709	25
Chicago I. & L. Ry. Co. v. Peterson, 169 N. W. (Wis.) 558	25
Chicago & N. W. Ry. Co. v. J. I. Case Plow Wks., 180 N. W. 846	25
Danzer v. Gulf Co., 268 U. S. 633, 69 L. Ed. 1126	22
Kansas City etc. Co. v. Wolf, 261 U. S. 133, 67 L. Ed. 571	12, 15, 20
Kirkpatrick Co. v. I. C. R. Co. (Miss.), 195 So. 692	26, 27
Louisville & N. R. Co. v. Cory, 54 F. (2d) 8	15, 23
Penn. R. Co. v. Carolina Portland Cement Co., 16 F. (2d) 760	24
Penn. R. Co. v. Susquehanna C. Co., 23 F. (2d) 499	12, 15, 16, 23, 31, 35
Phillips v. Grand Trunk, 236 U. S. 662, 59 L. Ed. 774	11, 15, 17, 18, 19, 21, 23
Spartan Mills v. Davis, Director Gen. (S. C.), 119 S. E. 905	25
Texas etc. R. Co. v. Leatherwood, 250 U. S. 478, 63 L. Ed. 1096	26
U. S. ex rel. Louisville Cement Co. v. Interstate Comm. Comm., 246 U. S. 638, 62 L. Ed. 914	12, 15, 21, 22
United States v. Koenig Coal Co., 270 U. S. 512, 70 L. Ed. 709	34
Vicksburgh etc. R. Co. v. Paup, 47 F. (2d) 1069	25
Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. (2d) 459	15, 22

Other References

Pages

The Statute Involved, Sec. 163(a) quoted 2

This Case:
Reference to decision of California District Court of Appeal 7, 8
Reference to decision of California Supreme Court ... 10, 31

This Court's Jurisdiction:
Sec. 237 Jud. Code [28 U.S.C.A. 344(b)] 13

Rule Permitting Filing of this Petition:
Rule 38(5)(a) 14

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

MIDSTATE HORTICULTURAL CO., INC.,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Midstate Horticultural Co., Inc., respectfully shows that:

This petition is concerned with the construction placed upon Section 16 (3)(a) of the Interstate Commerce Act by the Supreme Court of the State of California, which petitioner contends is in direct contra-

diction of the interpretation placed upon that section by this Court and by every Federal Appellate Court which has been called upon to consider the section.

Section 16 (3)(a) of the Act reads:

> "All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." (49 U. S. C. A., Sec. 16 (3)(a).)

SUMMARY OF THE POINT INVOLVED.

This application presents for consideration a single clean-cut legal proposition.

In October and November of 1932 respondent carrier transported on petitioner's order twenty-one carloads of grapes from California, each of which was originally consigned, or, while in transit, diverted to Jerome Distributing Company at a stated destination located either in New York or New Jersey.

None of the transportation charges for such grapes was prepaid by petitioner. Although respondent carrier was legally obligated to collect such transportation charges from the Jerome Distributing Company upon delivery to it of the shipments; instead of so doing, in purported payment of such and other charges (R. 104, fol. 160), it accepted from Jerome Distributing Company, three checks, viz., one dated November 21, 1932 for $10,433.46 (R. 100-1, fols. 153-155), another dated November 22, 1932 for $7035.19 (R. 101-102, fols. 155-157) and another dated Novem-

ber 19, 1932 for $9237.11. (R. 103-104, fols. 158-159.) Photolithographs of these checks will be found on pages 159 and 164 of the record.

At or about the time these checks were accepted, *respondent receipted in full the freight bills covering the shipments above mentioned* and delivered them to the consignee, Jerome Distributing Company (R. 111-114, fols. 170-174), which in turn sent them to the consignor, petitioner herein, obviously for the purpose of convincing petitioner that the transportation charges had been paid. (R. 153-155, fols. 231-235.)

The bank upon which the Jerome Distributing Company's checks were drawn refused payment on the ground of insufficiency of funds on deposit to cover them. (R. 100, fol. 154; R. 102, fol. 156; R. 104, fol. 159.)

Subsequently respondent carrier instituted an action in the New York Courts against the Jerome Distributing Company to enforce payment of the three checks above mentioned, and on July 9, 1936, secured judgment against that company in the sum of $21,294.00. (R. 121, fol. 184-185.)

All attempts by respondent to enforce payment of the judgment were without avail, because of the insolvency of the Jerome Distributing Company.

No notice was given petitioner that the freight charges had not been paid, that respondent had taken checks in payment or purported payment thereof, or that the checks had been refused payment, until June 23, 1933. (R. 143-145, fols. 217-220.)

Within a few days before the expiration of the three-year period within which an action could be brought to recover such transportation charges, respondent for the first time demanded payment thereof from petitioner. (R. 122, fol. 187.) In fact, during the interim, damage claims were paid by respondent to petitioner without any attempt on the part of respondent to offset them because of the unpaid transportation charges here involved. (R. 147-148, fols. 223, 224.)

To permit it to investigate the basis of said demand, petitioner, on October 25, 1935, signed a waiver of the statute of limitations, in consideration of which respondent agreed to defer its threatened action until January 1, 1936. This waiver, after reciting petitioner's desire for additional time to investigate the claim, contained the following:

> "Now, therefore, in consideration of the forbearance of The Pennsylvania Railroad Company to bring such a suit against the Mid-State Horticultural Company, Inc. prior to October 28, 1935, the said Mid-State Horticultural Company, Inc. hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an action it, the said Mid-State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.
>
> "This agreement is not an admission of the alleged debt by the Mid-State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid-State Horticultural Company, Inc. may have to said claim.

"Dated at Philadelphia, Pa., this 25th day of October, 1935." (Ex. C, attached to First Amended Complaint, R. 39-41, fols. 53d, 53e.)

As a result of its investigation, petitioner, concluded that it was not responsible for the claimed transportation charges and so advised respondent, whereupon the action herein involved was instituted.

In its defense petitioner contended that the waiver of the statute of limitations signed by it, and the coincident agreement by respondent to defer its contemplated action until January 1, 1936, violated the purposes intended to be accomplished by Congress in enacting the Interstate Commerce Act, as such purposes had been repeatedly declared by this and other federal Courts, and that they were therefore void. As a special defense, petitioner pleaded that because of respondent's conduct and silence, of which comment is made above, respondent was *estopped* from enforcing payment of such transportation charges against petitioner; it being asserted by petitioner that if it had been advised by respondent that its transportation charges had not been paid, or if respondent had not receipted the freight bills covering said charges, in settling its accounts with Jerome Distributing Company no credit would have been given to it by petitioner for such transportation charges, and petitioner would not now be confronted with the double payment of these charges in the event the judgment of the Court below is enforced.

The final pleadings in this case were: respondent's first amended complaint (R. 1-41) and petitioner's

demurrer thereto (R. 41-49, fols. 54-65); petitioner's amended answer (R. 51-77, fols. 72-110) and respondent's demurrer to petitioner's amended answer. (R. 77-81, fols. 112-117.)

The first amended complaint was divided into twenty-one causes of action (one for each carload of grapes). Petitioner, by demurrer to its amended answer, raised the point as to each count of plaintiff's amended complaint that it did not

> "state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of par. 3, sec. 16, of the Interstate Commerce Act." (R. 41-42, fol. 55; R. 42, fols. 55-56, etc.)

The trial Court struck from petitioner's pleading, and from the case, the special defense that respondent was estopped from looking to petitioner for payment of the freight charges because:

> (1) It accepted the checks of Jerome Distributing Company in payment of the charges, indorsed "paid" on the freight bills, and delivered such bills so receipted to such company.
>
> (2) Jerome Distributing Company delivered its "receipted" bills to petitioner and thus secured a credit by offset against moneys owing to petitioner from that company, save and except the nominal sum of $790.00, and then became insolvent.
>
> (3) By prosecuting its claim against Jerome Distributing Company to judgment it had sig-

nified its election to look to that company for the debt. (R. 74, fol. 106; R. 75, fol. 108; R. 78-79, fol. 114; R. 82, fol. 120.)

And following the trial, in reliance upon the purported "waiver" the Court found that the action was not barred by the provisions of Section 16 (3)(a), of the Act, despite the running of the three-year period, and gave judgment against petitioner for $21,822.86 and costs.

THE POINT WAS PRESENTED TO CALIFORNIA SUPREME COURT.

Petitioner appealed from the judgment and the appeal was first heard and determined by the District Court of Appeal of the State of California, for the Fourth Appellate District. That Court described the issue before it as follows:

> "The sole question involved in this appeal is this: Can the limitation provided in sub-paragraph 'a' of paragraph 3, of Sec. 16, of the Interstate Commerce Act be waived by the shipper by a written agreement executed upon sufficient consideration before the statute has run?" (R. 171, 172, fols. 256, 257.)

The two members of that Court, who joined in the majority opinion were misled into the belief that (to quote the Court):

> "The only question necessary for consideration is whether plaintiff's right of action to recover its bill for freight was created by the Interstate

Commerce Act or whether it existed independent of the act." (R. 173, fol. 260.)

From that premise they reasoned that the right of a railroad to sue for its charges existed at common law, and affirmed the judgment with the conclusion that since the right had existed at common law, Section (3)(a) of the Interstate Commerce Act was a mere statute of limitations which could be waived.

The third member of that Court wrote a strong dissenting opinion, analyzing the decisions in point and holding that:

"We conclude, therefore, that under the provisions of Section 16 (3)(a), upon the expiration of the period therein prescribed within which action must be taken by the carrier, the cause of action is destroyed and the court's jurisdiction over the matter is terminated; and that neither the carrier nor the shipper can legally waive the provisions of said section, nor extend the period within which an action must be instituted, and that any such waiver or agreement to forbear is contrary to the plain policy of the act and is therefore against public policy and void." (R. 191, fol. 284.)

Petitioner herein, thereafter sought and was granted a hearing of the cause by the Supreme Court of the State of California, the highest Court of the state. Petitioner in its petition for a hearing by that Court gave the following as the grounds:

"1. That the action is governed by the provisions of the Interstate Commerce Act, and par-

ticularly section 16 thereof, as construed and interpreted by the United States Supreme Court, the appellate courts of appeal, and the highest courts of the various states.

"2. That upon the expiration of three years from the delivery of the shipments involved, the right to collect the transportation charges was destroyed by the operation of section 16 (3)(a) of the Act, which expressly provides that it shall apply to 'all carriers subject to this chapter', and therefore the court lacked jurisdiction to enforce payment thereof.

"3. That the intent and purpose sought to be accomplished by Congress in passing the Act (implicit in the Act itself), prohibits the waiver of the limitation period prescribed by section 16 of the Act.

"4. Whether the pending action is one to enforce a right based upon the Interstate Commerce Act or rising out of contract is immaterial; defendant being a carrier subject to the Act, in either case upon the expiration of the limitation period, the right of action ceases and jurisdiction is lost.

"5. That regardless of all other considerations, it must be held that the Act created a right of action theretofore non-existent in federal jurisdiction, which Act prescribed the period within which such action had to be commenced, thereby bringing the existing controversy within the exception to the limitation rule recognized by the appellate court in its majority opinion.

"6. That if the appellate court correctly held that the right of action was not based upon the Act, but was at common law, its further holding that under the Act the defense of estoppel was not legally permissible, was unwarranted and constituted a miscarriage of justice by subjecting appellant to double liability.

"7. That a rehearing is essential to the end that uniformity of decision upon the important questions involved may be maintained (W. R. Phillips Co. v. Grand Trunk R. Co., 236 U. S. 662, 59 L. Ed. 774), and that appellant may not be subject to double liability by failure of the trial court to follow well-established legal principles." (R. 194-195, fols. 300-301.)

The Supreme Court of California heard the cause and affirmed the judgment on the same grounds as had been adopted in the majority opinion of the lower Appellate Court. (For the opinion see pages 196 to 204 of the Record.) It conceded that if, under Section 16 of the Act, the lapse of time "operates to terminate the obligation as well as bar the remedy", no waiver of the time element could be of any effect. (R. 199, fol. 307.) But it held that the cause of action is destroyed by the lapse of the period of limitations provided by the statute, only in those cases where the cause of action has been *created* by the statute, as distinguished from one existing at common law. On this point the Court said:

"This general rule (that the statute may be waived) governs unless the action is created by

statute and the language of definition requires a construction that the cause of action is destroyed by the lapse of the period of limitations provided by the statute." (R. 199, fol. 307.)

THE CALIFORNIA COURT'S DECISION IS DIRECTLY CONTRARY TO THIS COURT'S INTERPRETATION OF THE ACT.

The above conclusion of the California Supreme Court is directly contrary to this Court's decision in *A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, in which another subdivision of Section 16 of the Act (which, in common with Section 16. (3)(a), with which we are concerned, carried the words *"and after")* was being interpreted, and in which this Court said as to the claim that the statute of limitations might be waived:

> " 'But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, and *not after*. Under such a statute the lapse of time not only bars the remedy, but destroys the liability * * * To permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to

> the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here * * * For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action.'" (236 U. S. 662, 35 S. Ct. 446, 59 L. Ed. 774.)

The decision of the California Court is likewise in contradiction of this Court's decisions in *Kansas City So. Ry. Co. v. Wolf*, 261 U. S. 133, and in *U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 642, 88 Fed. (2d) 459, and other decisions noted in our accompanying brief.

The California Supreme Court in this case, in order to reach its decision against petitioner, ignored the plain dictates of the above language of this Court and adopted the contrary precedent of an *Ohio District Court* expressed in a less than one page opinion, containing no citation of precedent, rendered on the routine sustaining of a demurrer, in the case of *Pennsylvania Rr. v. Susquehanna Collieries*, 23 Fed. (2d) 499. (R. 197-198, fol. 306.) That decision was predicated on the theory that the interpretation of this Court in the *Phillips* case did not apply where the cause sued upon was of a kind recognized by the common law; and it ignored the plain intention of the words *"and not after"*, which term this Court in the *Phillips* case (supra) interpreted as meaning just what it says.

THIS PETITION IS IN TIME.

The Supreme Court's decision in the present case was rendered on November 27, 1942. (R. 196, fol. 304.) It denied petitioner a rehearing, thus giving finality to the judgment, on December 24, 1942. (R. 205, fol. 312.)

On March 16, 1943 this Court extended the time in which this petition should be filed to and including April 22, 1943. (R. 207.)

THIS COURT'S JURISDICTION TO HEAR PETITION.

This Court's jurisdiction to hear and grant this petition is found in Section 237, Judicial Code (28 U. S. C. A. 344 (b)), the pertinent portion of which reads as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

CONCLUSION.

Petitioner believes that this petition should be granted under the reason of *Rule 38* (5) (a) of this Court, which reads:

> "(a) Where a state court has decided a Federal question of substance, * * * in a way probably not in accord with applicable decisions of this Court."

Dated, San Francisco, California,
April 5, 1943.

Respectfully submitted,
HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Attorneys for Petitioner.

THEO. J. ROCHE,
GEORGE A. STOCKFLETH,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

The Supreme Court of California adopted a remarkable procedure in this case—in that it gave to a trial Court decision, rendered in a routine overruling of a demurrer, precedence over the decisions of this, the highest Court of the land, as well as of decisions of Federal Courts of Appeal.

The state Court decision after conceding that "the answer to the question is controlled by the Federal statutes and the Federal Courts' construction thereof as applied to similar facts", made its choice between:

(1) Following this Court's decisions in *Phillips v. Grand Trunk Western R. Co.*, 236 U. S. 662; *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, and *Kansas City So. Ry. v. Wolf*, 261 U. S. 133; the decision of the Circuit Court of Appeals of the Seventh Circuit in *Wisconsin Bridge & Iron Co. v. Illinois Terminal Co.*, 88 Fed. (2d) 459, and the decision of the Circuit Court of Appeals of the Sixth Circuit in *Louisville & N. R. Co. v. Cory*, 54 Fed. (2d) 8, on the one hand,

and

(2) Following at respondent's insistence the lonely decision of an Ohio District Court in *Pennsylvania R. Co. v. Susquehanna Collieries Co.*, 23 Fed. (2d) 499, on the other.

Surprising enough it is that the Court chose to follow the District Court decision, on the stated ground that it was the only case where the facts were

identical with those in the case at bar, and also chose to ignore the fact that the identical *principle* involved in the present case was involved and interpreted in the above cited decisions of this Court and of two Circuit Courts of Appeals.

But more surprising still is the fact that the precedent which that state Court adopted was a one-half page opinion rendered by a trial Court on the overruling of a demurrer, which contains no citation of authority; and, although decided in 1927, over 17 years ago, has never been cited—the state Court states it has been "neither disapproved or criticised". In other words it possessed neither "pride of ancestry, nor hope of posterity".

The holding in the Susquehanna case.

The *Susquehanna* case (supra) involved the same statute as is here involved, namely, Section 16 (3) of the Interstate Commerce Act. It was an action to recover demurrage charges, brought more than three years after the accrual of the action. The plaintiff alleged a written agreement of defendant waiving the statute. The defendant demurred, raising the bar of Section 16 (3).

The Court overruled the demurrer, giving as a ground that the cause of action was one growing out of contract rather than one conferred by the Interstate Commerce Act, and therefore the statute of limitations might be waived.

This Court's decisions on this point.

This Court in *Phillips v. Grand Trunk R. Co.*, 236 U. S. 662, very definitely disposed of the distinction upon which the Ohio District Court based its opinion, if any such distinction had ever existed. That was an action filed in the Circuit Court of the United States for the Eastern District of Michigan, by a shipper against a carrier for an overcharge of freight rates, and was predicated upon the fact that an increase in rates, which had been filed and upon which the charges were based, had been held unreasonable by the Interstate Commerce Commission. The action was instituted more than 2 years after the cause accrued. The limitation statute then read:

> "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrued, and not after." (34 St. at Large, 590, Chapter 3591.)

The defendant carrier demurred on the ground of the statute. The plaintiff unsuccessfully sought to avoid dismissal by arguing that the point was not raisable by demurrer since under Michigan law the defense of statute of limitations could not be the subject of a demurrer.

This Court held that upon the expiration of the two-year period, the cause of action was utterly destroyed; and in so deciding answered every argument respondent herein could make in support of the decision of the California Supreme Court in this case. For that reason we take the liberty of setting forth the following long quotation from that opinion:

"It is argued, however, that under the conformity act (Rev. Stat. Sec. 914, Comp. Stat. 1913, Sec. 1537), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. *But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years,* **and not after.** Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232, 31 L. ed. 128, 130, 8 Sup. Ct. Rep. 82), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, *either by silence or by express waiver,* to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against

> others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, *but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier.* The railroad company therefore was bound to claim the benefit of the statute here, and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action." (Emphasis by italics ours, by blackface, the Court's.)

From the foregoing quotation it will be observed that this Court's reasons for declaring that the lapse of the statutory time "destroys the liability" are primarily that:

> (1) The statute "indicates its purpose to prevent suits on delayed claims; by the provision that all claims for damages should be filed within two years *and not after.*" (Thus placing its emphasis on the words "*and not after.*")
>
> (2) The requirements of uniformity, "which must be borne in mind in construing the commerce act, demand that all defendants in actions between carrier and shipper be treated alike and prohibit "*either by silence or by express waiver*" the extending of the time within which to file

suit beyond that fixed by the act as the limit of action, and furthermore this Court went so far in its determination as to apply the statute which was particularly directed to actions filed before the Commission, to actions filed before the Courts.

In the present case as we have already shown the pertinent statute applies to "all actions at law by carriers for recovery of their charges", and declares that such actions *must* be begun "within three years from the time the cause of action accrues *and not after*". (Sec. 16 (3)(a) of the Act; 49 U. S. C. A., Sec. 16 (3)(a).)

In *Kansas City Southern Ry. Co. v. Wolf,* 261 U. S. 133, the plaintiff shipper without filing a claim with the Interstate Commerce Commissioner, sued the railroad to recover charges collected over and above the published tariff rates. The statute gave the shipper the alternative of filing a claim with the Interstate Commerce Commission or suing direct in the Courts. The limitation statute Section 16(3)(b) of the act read and still reads that "all complaints for damages shall be filed with the Commissioner within two years from the time the cause of action accrues, and not after".

The defendant demurred to the complaint on the ground that the cause of action was barred by the above referred to language of the act, while plaintiff contended that the two year statute was directed solely to complaints filed before the Commission. This Court held that the two year limitation applied irrespective of whether the action was before the Commission or in the Courts, and quoted in support of its holding, the

language from the decision in *Phillips Co. v. Grand Trunk* (supra), which we have quoted on pages 18-19 herein. In conclusion, this Court said:

> "The lapse of time has destroyed any liability by the carrier to the shipper." (140)

The same conclusion was reached by this Court in *U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission,* 246 U. S. 638, at 642, in which in applying Section 16 of the Act to a proceeding before the Commission, the Commission had held it had completely lost jurisdiction when the two years expired. This Court concurred in the following language:

> "We agree with this conclusion of the Commission, that the two-year provision of the act *is not a mere statute of limitation, but is jurisdictional,* * * * is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion. (Interstate Commerce Commission v. Northern P. R. Co., 216 U. S. 538, 544, 54 L. Ed. 608, 609, 30 Sup. Ct. Rep. 417.) That such was the opinion of this court was clearly intimated in *Phillips Co. v. Grand Trunk Western R. Co.,* 236 U. S. 662, 667, 59 L. Ed. 774, 776, 33 Sup. Ct. Rep. 444, and it conforms in principle to the holdings of the court with respect to a similar limitation, but for six years, on the jurisdiction of the court of claims. (Ford v. United States, 116 U. S. 213, 29 L. Ed. 608, 6 Sup. Ct. Rep. 360; Finn v. United States, 123 U. S. 227, 232, 31 L. Ed. 128, 130, 8 Sup. Ct. Rep. 82; United States v. Wardwell, 172 U. S. 48, 52, 43 L. Ed. 360, 361, 19 Sup. Ct. Rep. 86.)" (Italics ours.)

It was held to the same effect in *Danzer & Co. v. Gulf & Ship Island, R. R. Co.*, 268 U. S. 633.

Circuit Courts of Appeals decisions following "Phillips" case decision.

In *Wisconsin Bridge & Iron Co. v. Illinois Terminal Co.*, 88 Fed. (2d) 459, 461, the Circuit Court of Appeals of the 7th Circuit, reversed a District Court decision to the effect that the defendant was *estopped* from setting up the limitation of Section 16 (3) of the act, by requesting the submission of the controversy to the commission before bringing action. The court of appeals said with reference to that section of the act:

> "The Supreme Court has in numerous cases construed these limitations as jurisdictional, and held that the lapse of time not only bars the remedy but also destroys the liability."

and cited the four decisions of this Court which we have cited earlier in this brief, and quoted from that portion of the decision in *U. S. ex rel. Louisville Cement Co. v. I. C. C.*, 246 U. S. 638, which declares that Section 16 *"is not a mere statute of limitation, but is jurisdictional"* and that "the defense of statute of limitation *was not subject to estoppel*". (Emphasis ours.)

The opinion closed with the statement that *"events occurring subsequent to the delivery"* (of the goods to the carrier) "may not be relied upon to extend the period within which this suit must be brought". (462) (Emphasis ours.)

In *Louisville & N. R. Co. v. Cory,* 54 Fed. (2d) 8, the Court of Appeals of the Sixth Circuit, in reversing a District Court, answered the argument used by respondent in this case that Section 16 (3) of the Act does not apply to actions existing at common law, by holding that since Congress has made Interstate Commerce the subject matter of direct legislation, that section applies to all actions where the shipper has the right to petition the Interstate Commerce Commission "and this whether the shipper elects to pursue that form of remedy or one given him by the common law". (Citing *Phillips v. Grand Trunk etc.* (supra).) (11)

In face of the foregoing decisions of this Court and of the Courts of appeal, the decision of the California Supreme Court must stand or fall on the contrary precedent created by a trial judge in the *Susquehanna* case.

Forced to concede that "the answer to the question is controlled by the federal statutes and the federal court's construction thereof" (R. 197, fol. 305), the California Supreme Court selected as its precedents: (1) that portion of the trial Court's decision in the *Susquehanna* case which (without any cited precedent, federal or state) held that the right of action to recover charges grew out of contract and therefore could be kept alive by contract beyond the statutory period, and (2) the rule expressed in three California cases and two encyclopedia texts that "generally a statute of limitations may be extended or waived". (R. 199, fol. 307.)

We have already shown how the interpretation of the Interstate Commerce Act, contained in the Susquehanna decision, is overridden by this Court's decisions and those of different Circuit Courts of Appeal—and that the section of the act involved, by use of the words of emphasis "and not after" destroys the cause of action at the end of three years, despite any general rule as to the rights of waiver or estoppel.

The distinction claimed by respondent to exist between statutory actions and actions upon contract is here entirely inapplicable for the obvious reasons that the only thing contractual or within the power of agreement of the parties is the question of whether the shipper will ship. The conditions of shipment and the tariff to be paid are fixed by the Interstate Commerce Act and the regulations thereunder. The relationship, as well as the liability, arises out of and is based upon the Commerce Act.

The Circuit Court of Appeals of the Fourth Circuit declared in

Pennsylvania R. Co. v. Carolina Portland Cement Co., 16 F. (2d) 760, at 762,

that an action for demurrage charges, which is closely akin to an action for transportation charges,

> "is one which arises out of the statutes of the United States and the action of the Interstate Commerce Commission taken thereunder."

To the same effect, see:

Arkansas Fertilizer Co. v. United States, 193 Fed. 667 at 671 (Commerce Court);

Button v. A. T. & S. F. R. Co., 1 F. (2d) 709 at 711, 8th C. C. A.;

Chicago & N. W. R. Co. v. J. I. Case Plow Wks., 180 N. W. (Wis.) 846 at 847;

Chicago I. & L. Ry. Co. v. Peterson, 169 N. W. (Wis.) 558 at 559;

Vicksburg etc. R. Co. v. Paup, 47 F. (2d) 1069, 5th C. C. A.;

Blodgett Co. v. N. Y. C. R. Co., 159 N. E. (Mass.) 45 at 47.

The higher Courts of other states have found no difficulty in determining the proper federal interpretation of the act in its relation to the time of commencing actions, without recourse to trial Court opinions.

In *Spartan Mills v. Davis, Director General*, 119 S. E. 905 at 907, the claim was made that the limitation as specified in the bill of lading had been waived by the carrier. The South Carolina Court of last resort after holding that the waiver was legally deficient, said:

> "Even if there had been a positive agreement on the part of the defendant to extend the time within which such suit should be commenced it would not avail the plaintiff. * * * If the carrier may by agreement or by conduct fix what is a 'reasonable time for delivery' in any case it would seem that it might or might not invoke the defense of this contractual limitation at its option, and could in that particular practice at pleasure discrimination in the payment or contest of claims."

It then quotes from

Texas etc. R. Co. v. Leatherwood, 250 U. S. 478, 63 L. Ed. 1096, as follows:

> "It was decided that the parties to an interstate bill of lading cannot waive its terms; that the carrier cannot by its conduct give the shipper a right to ignore them; and that 'a different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed'."

The Carolina Court then declared that:

> "This declaration is equally applicable to the contract limitation relating to commencing suit."

In the late case of *L. M. Kirkpatrick Co. v. I. C. R. Co.,* 195 So. 692, 694, it was claimed that the action was barred because not brought within two years and a day from the time appellee rejected in writing appellant's claim for damages as required by the bill of lading. In affirming a judgment in favor of the defendant the Mississippi Supreme Court, among other things, said:

> "The outstanding purpose of the Commerce Act was to absolutely uproot and destroy all discriminations in interstate commerce regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished. To that end, the carrier is without power to waive any valid provision of the contract constituting a defense. Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co., 200 S. W. 109."

And after quoting from earlier cases, the decision proceeds:

"The carrier cannot by conversations, letters and negotiations extend the time for suit beyond that limited by the bill of lading and the Commerce Act. Shroyer v. Chicago R. I. & G. Ry. Co., 111 Tex. 24, 222 S. W. 1095. 'An interstate carrier cannot extend the time within which under the bill of lading a suit against it for loss of the goods may be brought, as that would involve a discrimination.'"

The decision then cites a number of state and *federal* cases, and with respect thereto states that they:

"although not directly in point lay down principles which inevitably lead to the conclusion that when the statute of limitations is put in operation, it cannot be estopped by agreement between the carrier and the shipper. * * *

"These decisions mean that under the provisions of the Commerce Act, and the uniform bill of lading provided by the Interstate Commerce Commission, the time fixed within which claim for loss shall be filed, as well as the time fixed within which suit must be brought, are conditions precedent to liability. In other words, after the lapse of such time, both the right and the remedy are barred. And, they mean further that neither period of time can be waived by the carrier. Otherwise, the door would be open to discriminations in favor of one class of shippers over another. The Commerce Act sought as far as possible to bring about not only uniformity and equality in rates but uniformity and equality in all services and practices of common carriers in interstate commerce. In considering this question, it should be borne in mind that this is not exclu-

sively private litigation—the result affecting alone the parties to the cause. In a large measure, it is public litigation—the result affecting the public generally, as well as the parties to the particular cause. The question as to what rights can be waived by a party to a transaction affected with a public interest, is very different where the rights of the parties alone are involved."

SECTION 16 OF THE COMMERCE ACT IS ALL EMBRACING AND APPLIES TO ALL ACTIONS AT LAW REGARDLESS OF THEIR ORIGIN OR CHARACTER.

Regardless of any other consideration, Section 16 of the Commerce Act is determinative of this controversy.

The majority opinion of the District Court of Appeal was based solely upon the ground that the action is a common law action, and not one created by or based upon the Interstate Commerce Act, and therefore Section 16 thereof, as to such character of action, should not be construed in accord with the decisions cited by petitioner.

The decision of the Supreme Court of California partakes largely of the same infirmity.

Such holdings, if adhered to, would necessarily require that said Section 16, with respect to one type of action at law should receive one construction, and as to all other actions at law another. In support of this strange and heretofore unknown rule of construction no authorities are or can be cited. To any such

principle petitioner is unable to subscribe. No such intention can logically or legally be imputed to Congress when enacting such section.

If Section 16 is applicable at all to this case (which respondent concedes) its effect, as heretofore judicially determined, is equally applicable.

It is, as it must be, conceded that Congress was constitutionally authorized to enact the Interstate Commerce Act, and that if deemed appropriate, it was legally empowered to therein provide that *any action at law,* whether brought by or against a carrier engaged in interstate commerce respecting interstate shipments, must be commenced within a specified period, **and not after,** with the intention that unless so instituted within the prescribed limitation period the cause of action would be destroyed and the Court deprived of jurisdiction to enforce the asserted claim.

With this concession in mind the **sole** legal question here involved can readily be determined by recourse alone to the provisions of Section 16 (including 3(a) of the Commerce Act). The language of this section is *all-inclusive;* it makes no distinction between actions based upon or created by the act and other actions, just so long as the action is an *action at law.* It relates to and completely envelops *every action at law* including those instituted by a carrier for the recovery of **all** freight charges or any part thereof. The only attribute that the action must possess to subordinate it to the terms of Section 16 is that it is an *action at law.* Section 16 3(a) reads:

> "*All actions at law* by carrier under the subject of this chapter for the recovery of freight charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, *and not after.*"

That this is an action at law is unquestioned. That it is an action for the recovery of freight charges is conceded. That the section in question applies to such an action, whether it is instituted to recover all freight charges or only a part thereof is obvious from the language of the section. The language in which Section 16 is couched is clear and definite. It possesses no latent ambiguity. Its purpose is made known to all who can read. Its understanding and interpretation are entirely outside of the realm of speculation or conjecture. "All actions at law by a carrier subject to this chapter" means exactly what it states and includes *all actions at law*, whether in the form of common law actions or *actions at law* instituted for the purpose of enforcing any of the rights mentioned in each subdivision of such Section 16. To hold otherwise would be to render innocuous and of no avail an express congressional mandate.

To arbitrarily divide actions at law into classifications and to construe Section 16 as to one of these classifications in one fashion and in another manner as to other classifications is a procedure heretofore unknown to legal jurisprudence.

That it was the intention of Congress to destroy the cause of action upon the expiration of the limitation

period is held in every case (except the so-called *Susquehanna* case) in which its construction was involved.

ALLEGED WAIVER OF LIMITATION STATUTE VOID BECAUSE PROHIBITED BY INTERSTATE COMMERCE ACT AS A DISCRIMINATION.

In concluding, contrary to the decisions of this Court, that the waiver of the statute of limitations was valid, the Supreme Court of California said:

> "However, as we have noted, a contract to preserve the carrier's right and duty to collect lawful freight charges as against the running of the statute of limitations when reasonably exercised, serves to prevent, rather than create, discrimination among shippers, and in our opinion, should not be deemed violative of the language or purpose of the Interstate Commerce Act."

This is in clear disregard of the decisions of this and other Federal Courts above cited. Preliminarily, it may be stated that it is not the *result* to either of the parties of the prohibited act which determines whether the Commerce Act has or has not been violated, but the possibilities which may follow in the event the act engaged in is given legal recognition. An extension of the statutory period within which suit is required to be instituted necessarily involves joint action by both carrier and shipper. The consideration for a waiver signed by the shipper is the agreement on the part of the carrier to forbear the institution of an action for some appreciable period of time beyond

the statute of limitations. In the absence of an extension or an agreement to extend by the carrier, the waiver would be legally ineffective. *And if the carrier is legally empowered to extend for even a day the period fixed in the statute, it possesses equal authority to extend it for a much longer period, or for years should it so desire.*

The question then arises: Could such waiver, signed by the shipper, and such extension granted, or agreed to be granted, by the carrier, operate as a discrimination or preference denounced by the Commerce Act? The answer to this question, which must be in the affirmative, conclusively brings such waiver and extension agreement within the prohibition of the act as well as of the decisions declaring void as against public policy any such waiver.

It is obvious that if, in consideration of the execution by the shipper of such waiver, the carrier is legally possessed of authority to extend the statutory time for the commencement of action by it against a shipper, it necessarily possesses the power *in its uncontrolled discretion* to discriminate between different shippers and thereby to prolong and possibly sustain the life of one shipper to whom the extension is granted, and at the same time to destroy the commercial existence of another shipper to whom such extension is denied. It could likewise choose between two shippers, each of identical financial stability, each requesting such an extension of credit based upon identical considerations, each willing to accept the same extension of time and each willing to execute a

waiver, and could grant the requested extension to one and deny it to the other.

If such conduct can be legally countenanced as between a carrier and two shippers, the possibility of comparable action on the part of the same or other carriers in their dealings with shippers generally can readily be comprehended.

To illustrate: If shippers knew that in the event they were subjected to financial pressure, by executing a waiver of the statute they could obtain from certain carriers an extension of credit or of the time in which incurred transportation charges would have to be paid, which extensions other carriers were unwilling to grant, discriminations of the most flagrant character would undoubtedly occur. And if such practices were indulged in, it is obvious that certain carriers would be enabled thereby to obtain business that normally would go to other cariers. Furthermore, in the event such practices were permitted, carriers themselves could discriminate between shippers—depending upon the volume of business controlled by certain shippers as against others—or upon the relative financial responsibility of the various shippers.

Thus to permit waiver of the statutory period of limitation by a shipper would make possible the preferences and discriminations denounced by the Interstate Commerce Act, and serve to defeat the purpose of that Act, just as surely as to permit waivers by the carrier would, as we have shown by the authorities heretofore cited, result in such preferences and discriminatoins. To confer authority upon the shipper to make such a

waiver would be as destructive of the scheme and purpose of the Act as to confer it upon the carrier. The result in the former case would be the same as that which the Court had in mind in

American Ry. Express Co. v. Shideler, 165 N. E. (Ind.) 336, at 337,

in stating that:

> "Under the law appellant and appellee were bound by the terms and provisions of the contract covering the transportation of this interstate shipment, and appellant did not and *legally could not waive the limitation of time* within which this action must by the terms of such contract be begun. * * *" (Citing cases.)

Under no circumstances may the statute be varied, enlarged, altered or waived by the carrier, since to do so would be in effect to give the person against whom it is waived, enlarged, etc. a greater and different right than other parties who deal with railroad carriers. Such a result is manifestly in contravention of the expressed purpose and effect of the Interstate Commerce Act.

In this connection we believe it also proper to call attention to the language of Mr. Chief Justice Taft in the case of

United States v. Koenig Coal Co., 270 U. S. 512,

as follows:

> "We have often declared that the purpose of Congress in the Elkins Law was to cut up by the roots every form of discrimination, favoritism and inequality."

CONCLUSION.

In closing we respectfully submit that the decision of the California Supreme Court does violence to this Court's interpretation of the Interstate Commerce Act, and a hearing of the cause by this Court is necessary to remove that precedent to the end that neither it nor the District Court decision of the *Susquehanna* case can hereafter lead other Courts away from the principles upon which the Interstate Commerce Act is based.

Dated, San Francisco, California,
April 5, 1943.

HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER.
Attorneys for Petitioner.

THEO. J. ROCHE,
GEORGE A. STOCKFLETH,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 7 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 13 40

MID-STATE HORTICULTURAL CO., INC.,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Mills Tower, San Francisco, California,
Attorneys for Petitioner.

THEO. J. ROCHE,
GEORGE A. STOCKFLETH,
Mills Tower, San Francisco, California,
Of Counsel.

Subject Index

	Page
Reference to Report of Opinion of the Lower Court	1
Jurisdictional Statement	2
Statement of the Case	2
Specification of Error	7
Argument	8
I. Interstate Commerce Act to be construed in accord with purpose sought to be accomplished by its enactment which is to prohibit preferences and discriminations	8
II. Upon the expiration of three years from the delivery of the shipments involved, the right to collect charges thereon was utterly destroyed by the operation of Section 16 (3) (a) of the Act, and thereafter the Court lacked jurisdiction to enforce the payment of such charges	11
Lapse of the three year period laid down by Section 16 (3) (a), not merely bars the remedy but destroys the right itself	12
The passage of the three year period of limitation fixed by Section 16 (3) (a), deprived the Court of jurisdiction to entertain the action	15
Section 16 (3) (a) effective even though not pleaded	18
III. The limitation provision of Section 16 (3) (a), cannot be waived, nor can a party be estopped to assert it	19
IV. Section 16 of the Commerce Act is all embracing and applies to all actions at law, including those having a common law origin	25
V. Assuming that the bill of lading, the form of which is provided by law and the Interstate Commerce Commission, establishes a contract between the parties,	

Page

any special agreement between the carrier and the shipper to prolong the limitation period prescribed by Section 16 (3) (a) of the Act constitutes a modification of the bill of lading in violation of law and is therefore utterly void 29

VI. Interstate Commerce Act for first time created a right which theretofore was non-existent in federal jurisdiction 36

VII. An action by a carrier to enforce payment of transportation charges is based upon the Interstate Commerce Act and not upon contract as contended by respondent and as held by the lower Court 40

VIII. The dissenting opinion in the case before the District Court of Appeal is consistent with the law as laid down by the decisions of this Court 47

Discussion of Respondent's Citations 48

Pennsylvania R. Co. v. Susquehanna decision 50

Legal principles enunciated in Susquehanna case decision are antagonistic to declarations of Appellate and other Courts 52

Cases relied upon by respondent in its answer to brief of petitioner accompanying the petition are neither controlling nor applicable 57

Alleged waiver of limitation statute void because prohibited by Interstate Commerce Act as a discrimination 60

Conclusion 63

Table of Authorities Cited

	Pages
Allen v. New York Ry. Co., 15 F. (2d) 532	47
American Ry. Express v. American Trust Co., 47 F. (2d) 16	36, 47
American Ry. Express Co. v. Shideler, 88 Ind. App. 645, 165 N. E. 336	22
Arkansas Fertilizer Co. v. United States, 193 Fed. 667	16, 18, 21, 38, 44, 52, 54
Atchison, T. & S. F. R. Co. v. Hunt Bros. Packing Co., 34 F. (2d) 582	60
Atchison T. & S. F. R. Co. v. Robinson, 233 U. S. 173	34
W. H. Blodgett Co. v. New York C. R. Co., 261 Mass. 365, 159 N. E. 45	35, 53
Button v. A. T. & S. F. Ry. Co., 1 F. (2d) 709 (C.C.A. 8)	14, 28, 39, 45, 52
Central R. Co. v. Mauser, 88 Atl. 791	41
Chesapeake and Ohio R. Co. v. Martin, 283 U. S. 209	32
Chicago & Alton R. v. Kirby, 225 U. S. 155	36
Chicago I. & L. Ry. v. Peterson, 168 Wis. 267, 169 N. W. 558	36, 46, 53
Chicago N. W. R. Co. v. J. I. Case etc. Wks., 173 Wis. 237, 180 N. W. 846	36, 46, 47, 53
Cohen v. Texas N. O. R. Co., 303 Ill. App. 606, 25 N. E. (2d) 562	33
Danzer v. Gulf Co., 268 U. S. 633	10, 14
Galveston etc. Co. v. Webster, 27 F. (2d) 765 (D. C. Tex.)	14, 25, 27, 38, 44, 52, 54
Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190	24
Hagger v. Helvering, Conn., 308 U. S. 389	8
Helvering v. New York Trust Co., 292 U. S. 455	9
Kansas City etc. Co. v. Wolf et al., 261 U. S. 133	10, 13, 27, 53
L. M. Kirkpatrick Co. v. I. C. R. Co., 195 So. 692	10, 31

Pages

Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59 57
Louisville & N. R. Co. v. Cory, 54 F. (2d) 8 (C.C.A. 6) 14, 18, 39
Louisville & N. R. Co. v. U. S., 282 U. S. 740 9

Morgan's L. & T. R. v. Cocke, 4 F. (2d) 961, 273 U. S. 655 14
Moser Co. v. Payne, Dir. Gen., 92 W. Va. 41, 114 S. E. 365 33

Nashville, Chattanooga & St. Louis R. Co. v. Tennessee, 262 U. S. 318 9
New York C. R. Co. v. Mutual Orange Distributors, 265 U. S. 59 59
New York, N. H. & H. R. Co. v. California Fruit Growers Exchange, 125 Conn. 241, 5 Atl. (2d) 353 33
Northern Wisconsin Co. v. Chicago & N. W. R. Co., 234 N. W. 726 36

Peninsula Pro. Exchange v. New York Co., 137 Atl. 350. 276 U. S. 599 ..... 14, 46, 53
Penn. P. Co. v. Carolina P. Cement Co., 16 F. (2d) 760 ..... 14, 39, 43, 49, 52
Penn RR. Co. v. Hamilton Coal Co., 125 Atl. 405 35
Penn RR. Co. v. Internat. Coal Mg. Co., 230 U. S. 184 35
Penn. R. Co. v. Midstate Horticultural Co., 124 P. (2d) 902 ..... 1, 61
Penn. R. Co. v. Midstate Horticultural Co., 21 Cal. (2d) 243 1
Penn. R. Co. v. Susquehanna C. Co., 23 F. (2d) 499 48
Phillips v. Grand Trunk R. Co., 236 U. S. 662 ..... 10, 13, 18, 19, 27, 53
A. J. Poor Grain Co. v. Chicago etc. Co., 12 Inter. Commerce Rep. 418 43

Rogers v. East Carolina Ry., 186 N. C. 86, 118 S. E. 885 24

Shroyer v. Chicago etc. Co., 222 S. W. 1095 33
Spartan Mills v. Davis, 126 S. C. 312, 119 S. E. 905 ..... 23, 30

Texas etc. R. Co. v. Leatherwood, 250 U. S. 478 31
Texas & P. R. Co. v. Interstate C. C., 162 U. S. 197 10

United States v. Koenig Coal Co., 270 U. S. 512 9
U. S. ex rel. Louisville Cement Co. v. I. C. C., 246 U. S. 638 ..... 15, 28

Pages

Vicksburg etc. R. Co. v. Paup, 47 F. (2d) 1069 ..... 46, 52

Western Union v. Esteve Bros., 256 U. S. 566 35
Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. (2d) 459 (C.C.A. 7) 14, 17, 20, 55

Zang v. Railway Express Co., 196 N. E. 901, 130 Ohio State 17 ..... 14, 47

Statutes

Interstate Commerce Act, Sec. 16 (3), (a), Title 49 U. S. C. A. Sec. 16 (3) (a) 2, 12, 18, 58
Interstate Commerce Act, Sec. 20, Title 49 U. S. C. A. Sec. 20, par. 11 ..... 22, 30

Title 28 U. S. C. A. Sec. 344 (a), (b) 2

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 913

MID-STATE HORTICULTURAL CO., INC.,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

REFERENCE TO REPORT OF THE OPINION OF THE LOWER COURT.

The official report of the opinion of the Supreme Court of the State of California, the lower court to which the writ of certiorari is directed, is found in 21 Cal. (2d) 243, 131 Pac. (2d) 544.

The majority and dissenting opinion of the District Court of Appeal of the State of California, have not been officially reported, but will be found in 124 Pac. (2d) 902.

JURISDICTIONAL STATEMENT.

This action concerns the collection of freight charges arising out of the transportation of commodities in interstate commerce.

Involved herein is the construction of Section 16 (3) (a) of the Interstate Commerce Act. The petitioner is concerned with the construction placed upon said section of the Interstate Commerce Act by the Supreme Court of the State of California, which petitioner contends is in direct contradiction of the interpretation placed upon that section by this court and by every federal appellate court which has been called upon to consider such section.

Section 16 (3) (a) of the Act reads:

> "All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." (49 U.S.C.A., Sec. 16 (3) (a).)

The court has jurisdiction of this proceeding under 28 U. S. C. A., Section 344 (a) (b).

STATEMENT OF THE CASE.

The action was instituted to recover from petitioner, consignor, certain transportation charges arising out of shipments in interstate commerce.

In October and November, 1932, respondent carrier transported on petitioner's order 21 carloads of grapes from California, each of which was originally con-

signed to, or, while in transit, diverted to the Jerome Distributing Company at a stated destination located in either New York or New Jersey.

It is admitted that none of the transportation charges for such grapes was prepaid by petitioner. Although respondent carrier was legally obligated to collect such transportation charges from Jerome Distributing Company upon delivery to it of the shipments, instead of so doing, in purported payment of such and other charges (R. 104, f. 160) it accepted from Jerome Distributing Company three (3) checks, viz.: one dated November 21, 1932 for $10,433.46 (R. 100-1, fols. 153-155), another dated November 22, 1932 for $7035.19 (R. 101-102, fols. 155-157), and another dated November 19, 1932 for $9237.11 (R. 103-104, fols. 158-159). Photolithographs of these checks will be found on pages 159 and 164 of the record.

At or about the time these checks were accepted, *respondent receipted in full the freight bills covering the shipments above mentioned* and delivered them to the consignee, Jerome Distributing Company (R. 111-114, fols. 170-174), which in turn sent them to the consignor, petitioner herein, obviously for the purpose of convincing petitioner that the transportation charges had been paid. (R. 153-155, fols. 231-235.)

The bank upon which the Jerome Distributing Company's checks were drawn refused payment on the ground of insufficiency of funds on deposit to cover them. (R. 100, fol. 154; R. 102, fol. 156; R. 104, fol. 159.)

Subsequently respondent carrier instituted an action in the New York Courts against the Jerome Distributing Company to enforce payment of the three checks above mentioned, and on July 9, 1936, secured judgment against that company in the sum of $21,294.00. (R. 121, fols. 184-185.)

All attempts by respondent to enforce payment of the judgment were without avail, because of the insolvency of the Jerome Distributing Company. This is clearly made manifest by the non-payment of the checks above mentioned (R. 125-129, fols. 191-196); respondent's unsuccessful efforts to collect the checks (R. 121, fol. 184); the default judgment entered against the Jerome Company in favor of respondent for the amount of the unpaid checks, which judgment could not be enforced (R. 121, fol. 185); and the further fact that respondent never received any moneys from the Jerome Company (R. 122, fol. 185).

No notice was given petitioner that the freight charges had not been paid, that respondent had taken checks in payment or purported payment thereof, or that the checks had been refused payment, until June 23, 1933. (R. 143-145, fols. 217-220.)

Long before such information was given to petitioner the Jerome Company had become insolvent and it was no longer possible for petitioner to enforce against it the collection of these transportation charges which, because of the freight bills receipted by respondent, it believed (as it had the right so to do) had been paid in full. It is because of this situa-

tion that if the judgment of the lower court is affirmed petitioner will be subjected to double liability.

Within a few days before the expiration of the three-year period within which an action could be brought to recover such transportation charges, respondent for the first time demanded payment thereof from petitioner. (R. 122, fol. 187.) In fact, during the interim, damage claims were paid by respondent to petitioner without any attempt on the part of respondent to offset them because of the unpaid transportation charges here involved. (R. 147-148, fols. 223, 224.)

To permit it to investigate the basis of said demand, petitioner, on October 25, 1935, signed a stipulation not to plead the statute of limitations, in consideration of which respondent agreed to defer its threatened action until January 1, 1936.

As a result of its investigation, petitioner concluded that it was not responsible for the claimed transportation charges and so advised respondent, whereupon the action herein involved was instituted.

In its defense petitioner contended that the waiver of the statute of limitations signed by it, and the coincident agreement by respondent to defer its contemplated action until January 1, 1936, violated the purposes intended to be accomplished by Congress in enacting the Interstate Commerce Act, as such purposes had been repeatedly declared by this and other federal courts, and that they were therefore void. As a special defense, petitioner pleaded that because of

respondent's conduct and silence, of which comment is made above, respondent was *estopped* from enforcing payment of such transportation charges against petitioner; it being asserted by petitioner that if it had been advised by respondent that its transportation charges had not been paid, or if respondent had not receipted the freight bills covering said charges, in settling its accounts with Jerome Distributing Company no credit would have been given to it by petitioner for such transportation charges, and petitioner would not now be confronted with the double payment of these charges in the event the judgment of the Court below is enforced.

The final pleadings in this case were: respondent's first amended complaint (R. 1-41) and petitioner's demurrer thereto (R. 41-49, fols. 54-65); petitioner's amended answer (R. 51-77, fols. 72-110) and respondent's demurrer to petitioner's amended answer. (R. 77-81, fols. 112-117.)

The first amended complaint was divided into twenty-one causes of action (one for each carload of grapes). Petitioner, by demurrer to its amended answer, raised the point as to each count of plaintiff's amended complaint that it did not

> "state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of par. 3, sec. 16, of the Interstate Commerce Act." (R. 41-42, fol. 55; R. 42, fols. 55-56, etc.)

The trial Court struck from petitioner's pleading, and from the case, the special defense that respond-

ent was estopped from looking to petitioner for payment of the freight charges because:

(1) It accepted the checks of Jerome Distributing Company in payment of the charges, indorsed "paid" on the freight bills, and delivered such bills so receipted to such company.

(2) Jerome Distributing Company delivered its "receipted" bills to petitioner and thus secured a credit by offset against moneys owing to petitioner from that company, save and except the nominal sum of $790.00, and then became insolvent.

(3) By prosecuting its claim against Jerome Distributing Company to judgment it had signified its election to look to that company for the debt. (R. 74, fol. 106; R. 75, fol. 108; R. 78-79, fol. 114; R. 82, fol. 120.)

And following the trial, in reliance upon the purported "waiver" the Court found that the action was not barred by the provisions of Section 16 (3)(a), of the Act, despite the running of the three-year period, and gave judgment against petitioner for $21,822.86 and costs. It is the affirmance of this judgment by California's Supreme Court, of which we here complain.

SPECIFICATION OF ERROR

The Supreme Court of California erred in holding that the three year time limit prescribed by Section

16 (3)(a) of the Interstate Commerce Act for the filing of action by the carrier to collect its charges, can be waived, and upon that ground affirming the trial Court's judgment against petitioner herein in an action filed more than three years after the accrual of the carrier's cause of action. (See opinion, R. 197-204.)

ARGUMENT.

I.

INTERSTATE COMMERCE ACT TO BE CONSTRUED IN ACCORD WITH PURPOSE SOUGHT TO BE ACCOMPLISHED BY ITS ENACTMENT WHICH IS TO PROHIBIT PREFERENCES AND DISCRIMINATIONS.

It is a cardinal rule of construction, universally recognized, that in construing and interpreting a statute the purpose sought to be accomplished by its enactment is the star by which the Court should be guided. As was said by this Court in the late case of

Hagger v. Helvering, Comm'r., 308 U. S. 389, 84 L. Ed. 340:

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to an absurd result is to be avoided when they can be given a reasonable application consistent with their words and the legislative purpose." (Citing many United States Supreme Court decisions.)

Moreover, each provision of the Act should be read in connection with its remaining provisions and con-

strued and interpreted with due regard to the manifest purpose of the whole Act.

Nashville, Chattanooga & St. Louis R. Co. v. Tennessee, 262 U. S. 318, 67 L. Ed. 999;

Helvering v. New York Trust Co., 292 U. S. 455, 78 L. Ed. 1361.

The purposes sought to be accomplished by Congress in its enactment of the Interstate Commerce Act are a part of the history of this nation and have been so comprehensively enunciated in numerous decisions construing various provisions of the Act that they need no reiteration here. This is pointed out in a long line of decisions, many rendered by this Court and other federal Courts, as well as the highest Courts of almost every state. It is impossible to misconceive these purposes because they are implicit in the Act. They are clearly set forth in

United States v. Koenig Coal Co., 270 U. S. 512 at 519, 70 L. Ed. 709,

where, in speaking of the purpose of the Act, this Court said:

> "We have often declared that the purpose of Congress in the Elkins Law was to cut up by the roots *every form of discrimination, favoritism and inequality.*"

In

Louisville & N. R. Co. v. U. S., 282 U. S. 740 at 749, 75 L. Ed. 672, 679,

it is stated:

> "The legislative history of the Interstate Commerce Act shows clearly that *the evil of discrimi-*

> *nation was the principal thing aimed at.* Senate Report No. 46, 49th Cong. 1st Sess. p. 215, See Kansas City S. R. Co. v. H. Albers Commission Co., 223 U. S. 573, 597, 56 L. Ed. 556. This court has said that the language of the Act is *'certainly sweeping enough to embrace all of the discriminations of the sort described which it was within the power of Congress to condemn'."*

which decision has been both amplified and reinforced by this Court's decisions in:

A. J. Phillips v. Grand Trunk R. Co., 236 U. S. 662, 59 L. Ed. 774;

Kansas City etc. Co. v. Wolf et al., 261 U. S. 133, 67 L. Ed. 571;

Danzer v. Gulf Co., 268 U. S. 633, 69 L. Ed. 1126,

and by many other cases to which reference is hereinafter made.

See, also,

L. M. Kirkpatrick Co. v. I. C. R. Co. (Miss.), 195 So. 692;

Texas & P. R. Co. v. Interstate Com. Com'n., 162 U. S. 197, 40 L. Ed. 940,

---

Unless otherwise noted any emphasis in quotations is ours.

II.

UPON THE EXPIRATION OF THREE YEARS FROM THE DELIVERY OF THE SHIPMENTS INVOLVED, THE RIGHT TO COLLECT CHARGES THEREON WAS UTTERLY DESTROYED BY THE OPERATION OF SECTION 16 3 (a), AND THEREAFTER THE COURT LACKED JURISDICTION TO ENFORCE THE PAYMENT OF SUCH CHARGES.

The shipments here involved were delivered to the consignee on various dates between October 28 and November 21, 1932, while the present action was not begun until December 31, 1935, some three years and forty days after the last delivery date. It is conceded that the causes of action for recovery of the charges upon each shipment accrued upon the date of delivery. It is petitioner's contention that upon the expiration of a period of three years subsequent to the delivery date respondent's claim for transportation charges was wiped out by operation of the provisions of Section 16 3 (a), of the Interstate Commerce Act (already quoted on p. 2 herein) and that such section had the effect of not merely barring the carrier's remedy for the collection of charges, but of uprooting and destroying the right itself, so as to forever discharge the shipper's liability therefor and even to deprive the courts of jurisdiction of an action seeking to recover such charges. These propositions, we maintain, are firmly established by a body of precedents by this Court as well as by other federal tribunals, and must compel a reversal of the judgment in this case.

Lapse of the Three-Year Period Laid Down by Section 16 3 (a) Not Merely Bars the Remedy, But Destroys the Right Itself.

While it is usual to refer to all statutes prescribing a definite period of time within which an action or proceeding may be instituted, as a statute of limitations, the statute here relied upon is not at all comparable to the usual one, which neither *destroys* nor *impairs the right of action itself,* but merely provides a pleadable defense of which advantage may be taken by defendant at his pleasure or discretion, and when not pleaded is unavailable as a defense. Inasmuch as such a statute confers upon a defendant a personal privilege which may or may not be exercised by him, and relates exclusively to the remedy and not to the right, it follows that its provisions may be waived either for a definite period or generally.

In the instant case, however, we are not dealing with such a statute of limitations. The statute here involved, by its very terms, upon the expiration of the time therein prescribed for the institution of an action, destroys the right of action itself.

Section 16, paragraph (3) (a), of the Interstate Commerce Act (49 U. S. C. A.) provides:

> "(a) All actions at law by carriers subject to this chapter for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, **and not after.**"

It is the phrase "*and not after*" as well as the purpose sought to be accomplished by the limitation

provision that differentiates this statute from the ordinary statute of limitations and which destroys the right of action itself instead of merely destroying the remedy.

The leading case upon this subject is

A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662, 59 L. Ed. 774,

which was an action to recover overcharges, commenced more than four years after plaintiff's cause of action arose. It was claimed that the case was governed by the Michigan practice, which precludes defendant from taking advantage of the statute of limitations by a general demurrer to the declaration. In overruling that contention and construing the statute here involved, this Court at page 667, said:

> "But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provisions that all complaints for damages should be filed within two years, **and not after.** Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232, 31 L. Ed. 128, 130, 8 Sup. Ct. Rep. 82), * * *" (Emphasis the Court's.)

The decision was approved in

Kansas City Southern Ry Co. v. Wolf, 261 U. S. 133, 67 L. Ed. 571,

where, after quoting extensively from the earlier case, this Court at pages 139-140 went on to say:

> "True it is that the claim of Phillips Company was based upon schedule tariff charges thereto-

fore declared to be unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the Phillips case and the reasoning advanced to support it we think are applicable to the circumstances of the instant case. *The lapse of time had destroyed any liability by the carrier to the shipper or his assignee* for the *alleged overcharges,* and the demurrer should have been sustained."

The following decisions approve the *Phillips* case (above quoted), either quoting it or using almost identical language:

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 Fed. (2d) 459 (Seventh C. C. A.);

Danzer v. Gulf etc. Co., 268 U. S. 633, 69 L. Ed. 1126;

Galveston etc. Co. v. Webster, 27 F. (2d) 765;

Morgan's L. & T. R. v. Cocke, 4 Fed. (2d) 961, 273 U. S. 655, 71 L. Ed. 825;

Peninsula Prod. Exch. v. New York etc. Co., 137 Atl. 350 (aff. by this court in memorandum opinion, 276 U. S. 599, 72 L. Ed. 724);

Button v. A. T. & S. F. Ry. Co., 1 F. (2d) 709;

Penn. R. Co. v. Carolina P. Cement Co., 16 F. (2d) 760;

Louisville & N. R. Co. v. Cory, 54 F. (2d) 8;

Zang v. Railway Express Co., 196 N. E. (Ohio) 901.

The Passage of the Three-Year Period of Limitation Fixed by Section 16(3)(a) Deprived the Court of Jurisdiction to Entertain the Action.

The vital and, for the purposes of this case, conclusive, difference between the effect of the limitation provision with which we are here concerned, and that of an ordinary statute of limitations which merely affords the defendant a personal privilege to set up lapse of time as a bar to the cause of action sought to be enforced against him, is brought out very clearly by the view, expressed in the majority of the decisions involving Section 16 (3) that the passage of the limitation period therein prescribed has the effect of depriving the Court or other tribunal of jurisdiction to entertain any proceeding for the enforcement of the claim or demand.

In the case of

U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Comm., 246 U. S. 638, 62 L. Ed. 914,

the Commission had refused to entertain a claim for overcharges upon the ground that it had been filed too late to comply with the provisions of Section 16, which then read:

> "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after."

Thereupon the claimant sought a writ of mandamus to compel the Commission to consider its claim. The

writ was denied by the lower Court. In reversing the judgment of the lower Court, for the reason that two years had not in fact elapsed following the accrual of the cause of action, this Court gave consideration to the effect of the statute upon the power of the Commission, and had this to say:

> "It is thus made very clear that the holding of the Commission was not that, having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was *jurisdictional* and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent that it related to the overcharges paid on February 1, 1911, was dismissed.
>
> We agree with this conclusion of the Commission, that the two-year provision of the act is *not a mere statute of limitation, but is jurisdictional,*—is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion * * * That such was the opinion of this court was clearly intimated in *Phillips Co. v. Grand Trunk Western R. Co.*, 236 U. S. 662, 667, 59 L. Ed. 774, 776, 33 Sup. Ct. Rep. 444, and it conforms in principle to a similar limitation, but for six years, on the jurisdiction of the court of claims (citing cases)." (p. 642.)

The same result was reached upon a similar set of facts in

Arkansas Fertilizer Co. v. United States, 193 Fed. 667,

which was a petition in the commerce court to annul an order of the Commission refusing to entertain a claim for damages filed beyond the two-year limit of Section 16. The Court rejected the petition, and said in part:

> "The purposes of the act as a scheme of regulation and the language of the provision in question indicate clearly that this is a limitation which operates without the aid of pleading. So far from being a defense which the carrier may or may not interpose, it is in effect a restriction upon the authority of the Commission itself, since its plain intent is to deprive that body of jurisdiction after the lapse of two years." (p. 673.)

And in the recent case of

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. (2d) 459 (Seventh C. C. A.),

where a carrier sought to recover freight charges, but delayed in commencing its action until more than three years after the cause of action had accrued, the Appellate Court, reversing a judgment for plaintiff, said of Section 16 (3) (a):

> "The Supreme Court has in numerous cases construed these limitations as *jurisdictional*, and held that the lapse of time not only bars the remedy but also destroys the liability * * *. This being true, we think that the defense of limitations was not subject to estoppel, and that it could properly be raised by demurrer or plea. *and even if appellant had failed to plead it, it would not thereby have conferred jurisdiction upon the court over the claim which had already been barred at the time the action was brought.*" (p. 461.)

Section 16(3)(a) Is Effective Even Though Not Pleaded.

Unlike the ordinary statute of limitations, which goes only to the remedy and not to the right, advantage of which is lost by failure to plead it, the three-year provision of Section 16(3)(a), like the other similar limitations contained in Section 16(3), is effective to bar an action commenced after that time even though it be not pleaded by the defendant. The extension agreement of October 25, 1935, upon which respondent relies to overcome the plea of limitations, provided that Midstate

> "will not *plead* in any such suit the defense of any general or special statute of limitations."

The ineffectiveness of such an agreement becomes apparent when it is realized that even had Midstate complied therewith by omitting to *plead* the provisions of Section 16(3)(a), the Court, in conformity with the decisions construing that section, should have applied it to the facts herein and held the action barred by lapse of time.

A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662, 667, 59 L. Ed. 774;

Louisville & N. R. Co. v. Cory, 54 F. (2d) 8, 11;

Arkansas Fertilizer Co. v. United States, 193 Fed. 667, 673.

III.

THE LIMITATION PROVISION OF SECTION 16(3)(a) CANNOT BE WAIVED, NOR CAN A PARTY BE ESTOPPED TO ASSERT IT.

A statute such as the one under consideration, which provides that an action must be commenced within a specified period of time *"and not after,"* and which, as we have heretofore demonstrated, has the effect of destroying the cause of action and depriving the Court or other tribunal of jurisdiction after the lapse of the time prescribed for bringing suit, is in such respects strikingly different from the ordinary statute of limitations which goes merely to the remedy. We now direct our attention to another characteristic of Section 16 (3) which differentiates it from the usual statute of limitations, namely, that it is not susceptible of waiver by the party in whose favor it runs, nor can such party, by no matter what conduct, estop himself to rely upon its provisions in his defense.

This peculiarity, like those previously discussed, arises from the construction of the section as part of the Interstate Commerce Act, and in consonance with the purposes to be achieved by the scheme of that Act. This was pointed out in the leading case upon the subject,

A. J. Phillips Co. v. Grand Trunk Western R. Co., 236 U. S. 662, 59 L. Ed. 774,

heretofore cited where this Court, holding that the bar of the statute might be asserted by way of general demurrer despite the Michigan practice to the contrary, said:

"This will more distinctly appear by considering the requirements of uniformity which in this, as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, *either by silence or by express waiver,* to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to the inequality of charges and inequality of facilities, but also the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The railroad company, therefore, was bound to claim the benefit of the statute here, and could do so here by general demurrer."

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. (2d) 459 (Seventh C. C. A.) heretofore cited,

was an action by a carrier to collect a balance due on transportation charges on certain shipments of steel. The defendant shipper relied upon the provisions of

Section 16 (3) (a), the action having been commenced more than three years after it accrued. The trial Court held that defendant was estopped from setting up the defense of limitations because the delay had been caused by the submission of the controversy to the Commission at defendant's request. The Circuit Court of Appeals reversed the judgment, and after referring to the propositions that the limitations of Section 16 (3) are jurisdictional and not only bar the remedy but destroy the liability, said:

> "This being true, *we think that the defense of limitations was not subject to estoppel.*" (p. 461.)

The plaintiff also attempted to make out a case of *implied contract,* and in rejecting this contention the Court referred to the fact that the cause of action accrued upon delivery of the shipments, and stated that

> "* * * events occurring subsequent to the delivery may not be relied upon to extend the period within which the suit must be brought."

As was said in the case

Arkansas Fertilizer Co. v. United States, 193 Fed. 667 at p. 671, heretofore cited:

> "Any serious doubt in this case should disappear, as we think, when once it is clearly perceived that the relations between shipper and carrier are no longer contract relations, that the rights and obligations of both are fixed, not by mutual agreement but by the mandate of the statute; and the duty of a shipper to pay and of the carrier to collect the tariff rate in force when the transportation takes place, even though that rate be grossly excessive, is a duty imposed

by legislative enactment; and *that it is beyond the power of the parties to evade or modify this duty by any consent or understanding.* In other words, since the obligation to pay the tariff charge springs from a positive law, the extension of credit because such charge is claimed or admitted to be unreasonable cannot be granted by the carrier or accepted by the shipper."

Among other things, the Interstate Commerce Act provides that it shall be unlawful for any carrier to provide by rule, contract, regulation or otherwise, a period shorter than two years for the institution of suit against it to recover damages arising out of the shipment. (49 U. S. C. A. Sec. 20, par. 11.) In many instances carriers, acting under authority of this provision, have issued bills of lading providing the time within which an action for damages must be commenced after notice by the carrier of disallowance of the claim. In such cases the limitation of time, although authorized by statute, is necessarily based upon a contract entered into between the parties. *Nevertheless,* the Courts have had no difficulty in declaring void as against public policy any attempt on the part of the carrier or shipper to enlarge, vary or waive the limitation of time originally specified in the bill of lading.

In

American Railway Express Co. v. Shideler (Ind.), 88 Ind. A. 645, 165 N. E. 336,

where it was claimed that the limitation had been waived and that the action was therefore not barred, the Court said:

"Under the law this action was, at the time it was begun, barred by limitation made a part of the contract for transportation of the car of tomatoes involved in this action, upon which contract appellee sued herein.

"Under the law appellant and appellee were bound by the terms and provisions of the contract covering the transportation of this interstate shipment and appellant did not and legally could not waive the limitation of time within which this action must, by the terms of such contract, be begun." (Citing cases.)

One of the leading cases of this class is

Spartan Mills v. Davis, Director Gen. (S. C.), 126 S. C. 312, 119 S. E. 905 at 907.

There it was claimed that the limitation, as specified in the bill of lading, had been waived by the carrier. After holding that the alleged waiver was legally deficient, the Court said:

"Even if there had been a positive agreement on the part of the defendant to extend the time within which suit should be commenced, it would not avail the plaintiff. In the case of Allen v. Davis, 118 S. E. 614, this court declares: 'While we have been cited to no decision upon the precise point here involved, the Supreme Court of the United States would seem to be clearly committed to the doctrine that the prohibitions of the federal law "against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier" (citing cases) * * * If the carrier may by agreement or by conduct fix what

is "a reasonable time for delivery" in any case it would seem that it might or might not invoke the defense of this contractual limitation at its option and could in that particular practice at pleasure discrimination in the payment or contest of claims. (Citing cases.)' "

See, also,

Rogers v. East Carolina Ry. (N. C.), 186 N. C. 86, 118 S. E. 885.

In

Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948,

there was involved, among others, the question whether a claim for damages had been properly made against the carrier as required and within the time prescribed by the bill of lading issued by the initial carrier. Mr. Justice Hughes, speaking for the Court, said:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms, which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariff and regulations. *A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed* (citing cases). *We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and, as we find it to be both applicable and valid, effect must be given to it.*"

IV.

SECTION 16 OF THE COMMERCE ACT IS ALL EMBRACING AND APPLIES TO ALL ACTIONS AT LAW, INCLUDING THOSE HAVING A COMMON LAW ORIGIN.

The proposition above entitled is given consideration in the brief filed by petitioner in support of its application for certiorari. (Brief, pp. 28-31.) We do not believe that any useful purpose will be subserved by a reproduction here of the argument there made and we are therefore limiting ourselves to the following supplement thereto.

With the exception of the character of the claim referred to, each subdivision of Section 16 is couched in comparable language. The statute (Sec. 16) is made specifically applicable to *all* actions at law by a carrier *which is subject to the Act*, and makes no distinction between an action brought to enforce a right given by the Act and an action based on a contract or otherwise founded—the *sole* qualifications being that the action shall be one *at law* and must be one instituted *by* or *against* a "*carrier* subject to this chapter." As was said in *Galveston etc. Co. v. Webster*, 27 Fed. (2d) 765,

> "The Congress has undertaken in this Transportation Act to definitely fix the time within which *carriers of interstate commerce* may bring suits for recovery of freight charges. * * *"

In all of the decisions in which Section 16 has been construed, with the exception of the *Penn. R. Co. v. Susquehanna Co.* case (supra), it has been consistently held that, *by virtue of the language of the section,*

at the expiration of the period therein prescribed the cause of action was utterly and completely destroyed, and the Court's jurisdiction to enforce the asserted claim terminated. In no decision other than the *Susquehanna* case is it intimated or suggested that because of the character of the action the provisions of said Section 16 should be given any other or different construction. Moreover, it must be apparent that if Congress had intended that such construction should be given to Section 16 only in the event the action were instituted to enforce a liability *created* by the Interstate Commerce Act, certainly it would have so provided, and not left the matter to conjecture. As no intimation to that effect appears in the statute it should, as provided in the Act, be applied by the Courts, equally to *all* actions instituted by a carrier which is subject to the Act, for the recovery of freight charges.

It would be inconceivable to assume that considering the purposes of the Act, in adopting regulatory legislation respecting carrying and demurrage charges, Congress would intentionally make such legislation applicable only to such charges as are based upon the provisions of the Act, but not to those based upon contract itself predicated on the Act. Such legislation would invite and bring about the very evils which Congress intended to root out.

It is universally known that the language in which a statute of limitations is ordinarily couched does not include the above quoted phrase. To such statute the addition of the words **"and not after"** would be un-

necessary if it were intended to apply solely to a right of action *created* by the statute itself, for the reason that in such event, without the addition of such phrase, the cause of action would not survive the period of limitation there prescribed. If, in its application to actions other than those based upon the statute, it was not intended to obliterate the cause of action, the inclusion of the phrase referred to was unnecessary. That it was purposely inserted admits of no doubt. What that purpose was is self-evident. It must be apparent that when it made such statute applicable to *all* actions brought by a "*carrier subject to the act*" and included in the statute the words "**and not after**", Congress intended—as the Courts have repeatedly held—to make clear and indisputable its meaning that, regardless of the basis of the action, at the expiration of the prescribed period the right of action should cease to exist.

That the contention just made has received judicial sanction was pointed out by this Court in the case of *Phillips v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. Ed. 774:

> "*Under such a statute the lapse of time not only bars the remedy but destroys the liability.*"

See also:

U. S. ex rel. Louisville Cement Co. v. Interstate Com. Com'n, 246 U. S. 638, 62 L. Ed. 914;

Kansas City S. Ry. Co. v. Wolf, 261 U. S. 133, 67 L. Ed. 571;

Galveston etc. Co. v. Webster, 27 F. (2d) 765.

In

U. S. ex rel. Louisville Cement Co. v. Interstate Com. Com'n, 246 U. S. 638, 62 L. Ed. 914,

which was a mandamus proceeding to compel the Commission to entertain and proceed to adjudicate a cause which the Commission had declared not to be within its jurisdiction, the Court, in commenting upon the construction to be given Section 16, said:

> "As to the portion of the claim which we are considering, the report of the Commission is as follows:
>
> 'The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation of the Act: "All complaints for recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, **and not after.**" * * *'"

This Court, after referring to the date upon which the action accrued as determined by the Commission, and the determination of the Commission that because of such date the overcharges were barred from its consideration, said:

> "We agree with this claim of the Commission *that the two-year provision of the Act is not a mere statute of limitations, but is jurisdictional —it is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion.*"

See, also,

Button v. A. T. & S. F. Ry. Co., 1 F. (2d) 709.

V.

ASSUMING THAT THE BILL OF LADING, THE FORM OF WHICH IS PROVIDED BY LAW AND THE INTERSTATE COMMERCE COMMISSION, ESTABLISHES A CONTRACT BETWEEN THE PARTIES, ANY SPECIAL AGREEMENT BETWEEN THE CARRIER AND THE SHIPPER TO PROLONG THE LIMITATION PERIOD PRESCRIBED BY SECTION 16(3)(a) OF THE ACT CONSTITUTES A MODIFICATION OF THE BILL OF LADING IN VIOLATION OF LAW AND IS THEREFORE UTTERLY VOID.

Respondent contended in the Court below that the action was at common law because based on the bill of lading and that notwithstanding the express language of Section 16 (3) (a), and the reasons which brought about its enactment, it is nothing more or less than a mere statute of limitations which bars the remedy and does not affect the right of action. In this holding the Appellate Court erred.

Assuming that this action is contractual in character, keeping in mind the primary purpose sought to be accomplished by the enactment of the Interstate Commerce Act and its amendments which was to prevent discriminations and preferences, the legal principles applicable to actions admittedly based upon the Act apply with equal force to actions predicated upon a bill of lading where an attempt is made to extend the limitation period fixed in Section 16 (3) (a) of the Act.

Among other things, the Interstate Commerce Act provides that it shall be unlawful for any carrier to provide by rule, contract, regulation or otherwise a period shorter than two years for the institution of

suit against it to recover damages arising from a shipment. (49 U. S. C. A., sec. 20, par. 11.) In many instances, carriers acting under authority of this provision have issued bills of lading providing that such action for damages must be commenced within two years and a day of notice by the carrier of disallowance of the claim. In such cases the limitation of time, *although authorized by statute,* is necessarily based upon a contract entered into between the parties. Nevertheless, the Courts have had no difficulty in declaring void as against public policy any attempt on the part of the carrier or shipper to enlarge, vary or waive the limitation of time originally specified in the bill of lading. One of the leading cases of this class is

Spartan Mills v. Davis, Director General, 119 S. E. (S. C.) 905 heretofore quoted from.

There it was claimed that the limitation, as specified in the bill of lading, had been waived by the carrier. After holding that the alleged waiver was legally deficient, the Court said:

> "Even if there had been a positive agreement on the part of the defendant to extend the time within which such suit should be commenced it would not avail the plaintiff. * * * If the carrier may by agreement or by conduct fix what is 'a reasonable time for delivery' in any case it would seem that *it might or might not invoke the defense of this contractual limitation at its option, and could in that particular practice at pleasure discriminate in the payment or contest of claims.*"

It then quotes from

Texas etc. R. Co. v. Leatherwood, 250 U. S. 478, 63 L. Ed. 1096,

as follows:

> "It was decided that the parties to an interstate bill of lading cannot waive its terms; that the carrier cannot by its conduct give the shipper a right to ignore them; and that *'a different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed.'* "

The Carolina Court then declared that

> *"This declaration is equally applicable to the contract limitation relating to commencing suit."*

In the late case of

L. C. Kirkpatrick Co. v. I. C. R. Co., 195 So. 692,

it was claimed that the action was barred because not brought within two years and a day from the time appellee rejected in writing appellant's claim for damages as required by the bill of lading. In affirming a judgment in favor of the defendant the Mississippi Supreme Court, among other things, said:

> "The outstanding purpose of the Commerce Act was to absolutely uproot and destroy all discriminations in interstate commerce regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished. To that end, *the carrier is without power to waive any valid provision of the contract constituting a defense.* Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co., 200 S. W. 109."

And after quoting from earlier cases, the decision proceeds:

> "The carrier cannot by conversations, letter and negotiations extend the time for suit beyond that limited by the bill of lading and the Commerce Act. Shroyer v. Chicago R. I. & G. Ry. Co., 111 Tex. 24, 222 S. W. 1095."

The decision then, after citing a number of state and federal cases, states:

> "The Commerce Act sought as far as possible to bring about not only uniformity and equality in rates but uniformity and equality in all services and practices of common carriers in interstate commerce. In considering this question it should be borne in mind that this is not exclusively private litigation—the result affecting alone the parties to the cause. *In a large measure it is public litigation—the result affecting the public generally as well as the parties to the particular case.* The question as to what rights can be waived by a party to a transaction affected with the public interest, is very different where the rights of the parties alone are involved."

See, also,

Chesapeake & Ohio R. Co. v. Martin, 283 U. S. 209, 75 L. Ed. 983,

where this Court had before it an action to recover damages for the misdelivery of a carload of potatoes. No notice of loss was given or claim for damages made until more than six months and twenty days after shipment from Michigan, although the bill

of lading contained a provision requiring such notice within six months after delivery of the property or, in case of failure to make delivery, after reasonable time for delivery had elapsed.

The Court reversed a judgment of the Virginia Courts in favor of plaintiff and after pointing out that the matter was one of federal law, said of plaintiff's contention that the railroad was estopped to rely upon the limitation provision:

> "To allow it would be to alter the terms of the contract made in pursuance of the Interstate Commerce Act and having, in effect, *the quality of a statute of limitations*, and thus to open the door for evasions of the spirit and purpose of the act to prevent preference and discrimination in respect of rates and service."

See also:

Shroyer v. Chicago, etc. Co., 222 S. W. 1095;
Cohen v. Texas N. O. R. Co., 25 N. E. (2d) (Ill.) 562;
N. Y., N. H. & H. R. R. Co. v. California Fruit Growers Exchange, 5 Atl. (2d) (Conn.) 353;
Wm. F. Moser Co. v. Payne, Direc. Gen., 114 S. E. (W. Va.) 365.

The foregoing authorities demonstrate that, even if the present action were looked upon as contractual in character, the attempted waiver of the limitation statute was a violation of the spirit and purpose of the Interstate Commerce Act which makes the contract one which is unchangeable by the parties.

Section 16 (3) (a) of the Interstate Commerce Act constituted part of the agreement entered into between the parties as fixed by the bill of lading. In accordance with the claim of the Act, the bill of lading, including, as it does, the provisions of the Act and the Commission's regulations, measures the rights and liabilities of the parties, and no agreement by carrier or shipper not reflected by or found in the bill of lading (including the provisions of the Act read therein) is valid or enforceable, but, on the contrary, is absolutely void. The agreement entered into between the parties herein purporting to waive the provisions of Section 16, and therefore modifying the bill of lading in which the appurtenant provisions of Section 16 are to be read, *is a special agreement varying the contract reflected by the bill of lading and must be struck down as void.*

The principle just stated is pointed out in the decisions where, by special agreement, the parties attempted to modify the bill of lading with respect to the inclusion of services not within the tariff rates specified in the bill of lading or some other comparable provision.

In

A. T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173, 58 L. Ed. 901,

the plaintiff shipper sued to recover damages resulting from the late delivery of and injury to a race horse. The defendant carrier claimed that plaintiff's right was controlled and defendant's liability limited

by its published tariffs. After citing a number of decisions, the Court said:

> "We regard these cases as setting the proposition that the shipper, as well as the carrier, is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties. * * * To give to the oral agreements upon which the suit was brought, the prevailing effect allowed in this case by the judge of the trial court, affirmed by the judgment of the supreme court of the state, would be to allow it a *special contract* to have binding force and effect, though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this kind can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. * * * To maintain the supremacy of such oral agreements *would defeat the primary purpose of the Interstate Commerce Act so often affirmed in decisions of this court which are to require equal treatment of all shippers and the charging of but one rate to all, and that one as required by the act.*"

See also

Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U. S. 566, 65 L. Ed. 1094;

Penn. R. Co. v. Hamilton Coal Co., 125 Atl. (Md.) 405;

Penn. R. Co. v. International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446;

W. H. Blodgett Co. v. N. Y. Cent. R. Co. (Mass.), 159 N. E. 45;

Chicago & Alton R. v. Kirby, 225 U. S. 155, 56 L. Ed. 1033;

Northern Wisconsin P. Co. v. Chicago & N. W. R. Co. (Wis.), 234 N. W. 726;

American Ry. Express Co. v. American Trust Co., 47 F. (2d) 16,

where it is said:

> "The tariff provision necessitating the delivery of the money to the carrier's office is *one which could not be waived by the agreement of the parties*, nor by a custom which might have constituted a waiver *had appellant not been a common carrier.*"

Chicago I. & L. Ry. Co. v. Peterson, 169 N. W. (Wis.) 558;

Chicago & N. W. Ry. Co. v. J. I. Case Plow Wks., 180 N. W. 846.

VI.

INTERSTATE COMMERCE ACT FOR FIRST TIME CREATED A RIGHT WHICH THERETOFORE WAS NON-EXISTENT IN FEDERAL JURISDICTION.

Federal jurisdiction over a subject-matter covered by federal laws constitutionally enacted occupies the same situation with respect to the several states as the laws of one state occupy with respect to the laws of another state. Such federal enactments are neither controlled nor affected by either the statute or common law of the state. Each is exclusive within its own jurisdiction.

So here, when the Transportation Act was enacted it *created a right* which previously did not exist in federal jurisdiction and with respect to which there neither was nor is any federal common law. Furthermore, as heretofore pointed out, it superseded and was a complete substitute for any state law, either statutory or common, then or previously existing in any state.

The Federal Courts have determined repeatedly and in no uncertain language what was the purpose of the enactment of the Interstate Commerce Act, which purpose extended to all of its provisions, including Section 16. The common law right of the carrier to collect transportation charges from the shipper which was strictly a contractual right, either express or implied, no longer exists. The Interstate Commerce Act changed the character and dimensions of the carrier's right to look to the shipper for his transportation charges by eliminating entirely the right of the parties to determine as between themselves the tariff rate, and by prescribing what the tariff rate should be. It substitutes the will of the Interstate Commerce Commission for the will of the parties. The tariffs prescribing the rates of the carrier, which alone it is permitted to collect or enforce, are brought into existence and published under the compulsion of the Act and must be approved by the Commission before they become effective. In the absence of the filed tariffs and their approval by the Commission, the carrier cannot enforce, by judicial process or otherwise, its claimed transportation charges.

Respondent appreciated this legal situation when, for the purpose of stating a cause of action, it alleged in its amended complaint its compliance in these respects with the Interstate Commerce Act. (R. 2, fol. 3.)

It is thus seen that the *basis* of the carrier's right of action is the tariff rate prescribed in its tariff schedules approved by the Interstate Commerce Commission, *both required by the Act,* and it is the transportation charges designated in such tariffs alone which the Act not only permits *but requires* the carrier to sue for and collect.

The right, therefore, is entirely foreign to the right recognized by the common law, and the only logical conclusion is that the Act not only *creates* the right upon which the action is based, but likewise imposes upon such right the limitation period prescribed in Section 16 of the Act.

However, no necessity exists to theorize upon this subject because it has been repeatedly determined by the Courts. In

Galveston v. Webster, 27 F. (2d) 765 (supra), the Court said:

> "The single subject-matter of the suit is the recovery by the carrier of his charges for freight in interstate transport. *Its right to sue was given by the Interstate Commerce Act. The federal law governs.*"

In

Arkansas Fertilizer Co. v. United States (I. C. C. Intervener), 193 Fed. 667,

it is said:

"* * * But the rights and obligations of both (carrier and shipper) are fixed not by mutual agreement *but by the mandate of the statute:* and the duty of a shipper to pay and of a carrier to collect the tariff rate in force when the transportation takes place, *even though that rate be grossly excessive,* is a duty imposed by legislative enactment. * * * The obligation to pay the tariff charges springs from a positive law * * *"

In

Button v. A. T. & S. F. R. Co., 1 F. (2d) 709,

it is said:

"There is no other ground upon which the case may be rested. Plaintiff's right of action is *given by statute.*"

In

Penn. R. Co. v. Carolina P. Cement Co., 16 F. (2d) 760,

the Court said:

"The cause of action is one *created by statute* which fixes the time within which action must be brought as an essential element of the right to sue."

In

Louisville & N. R. Co. v. Cory, 54 F. (2d) 8,

the proposition involved was directly determined. There, in reversing the judgment of the trial Court, the Appellate Court said:

"It is also urged by plaintiff that the statute of limitations prescribed by Section 16 (3, b) Interstate Commerce Act, 49 U. S. C. A., sec. 16 (3) (a), has no application where the declara-

tion alleges *a right of recovery at common law.* It is clear that if a cause of action is created by an Act of Congress the statute of limitations fixed by such Act must govern."

VII.

AN ACTION BY A CARRIER TO ENFORCE PAYMENT OF TRANSPORTATION CHARGES IS BASED UPON THE INTERSTATE COMMERCE ACT AND NOT UPON CONTRACT AS CONTENDED BY RESPONDENT AND AS HELD BY THE LOWER COURT.

In holding that the pending action is not predicated upon the Act, the lower Court has not only ignored the provisions of such Act, but likewise the decisions to which the attention of this Court has already been called. The Court has likewise assumed that the bill of lading covering the transportation is all controlling with respect to the obligations of both carrier and shipper, regardless of the provisions of the Interstate Commerce Act or the rules and regulations of the Commission.

The transportation charges of a common carrier and the character and extent of the service to be rendered therefor are contained in its tariff which must be filed with and approved by the Interstate Commerce Commission. Such procedure is required by the Act and the rules and regulations of the Commission. The Act compels both the carrier and the shipper to conform in every particular with such tariff. No deviation is permitted to be made by either of them respecting the rates fixed or the services to be rendered

therefor. Both carrier and shipper are charged, *as matter of law*, with knowledge of such tariff and rates, thus based upon the Transportation Act and the rules of the Commission. If any difference exists between the transportation rates and services specified in the bill of lading and those specified in the tariff, the former is subordinated to the latter. If the bill of lading fixes a transportation rate less than that fixed in the tariff, by the very terms of the Act the carrier *must* collect the difference between the amount designated in the bill of lading and the tariff rate. If the charge fixed in the bill of lading is in excess of the tariff rate the shipper is entitled to have refunded to him the difference and to enforce such right by action. These provisions of the Act, as well as the rules and regulations of the Commission, were all enacted to prevent rebates, discriminations and preferences.

Thus it will be seen that the relations between the parties are not solely contractual, nor is the bill of lading the sole measure of the rights and liabilities of either or both.

It is for these, as well as other equally cogent reasons, that the Courts have consistently held that actions of this character are based upon the Interstate Commerce Act.

One of the leading cases upon this subject, which has been frequently cited, is

Central R. Co. v. Mauser, 88 Atl. (Pa.) 791, 49 L. R. A. (N. S.) 92,

where it is said:

"In the disposition of civil cases involving violation of the provisions of the federal interstate commerce act where the effort is to collect from a shipper the legal, prescribed rate for the service rendered, equitable principles play no part. Where there has been a departure from an established and published rate for the transportation of freight, it is never a question what the purpose back of it was, whether innocent or fraudulent, or whether occasioned by mutual mistake, or by the mistake of one of the parties acted upon by the other in good faith. Both parties are alike charged with full knowledge of the prescribed rates; and if either comes short in this, it is his own fault through negligence, or, what is worse, and neither may excuse himself by showing reliance upon representations as to prescribed rates or those appearing in the printed and published schedule. No agreement for a rate other than that prescribed for the particular service could have any binding force. No matter how induced, the law will refuse to recognize in it any of the characteristics of a contract. * * *

It follows necessarily that when these defendants accepted the services of the plaintiff as carrier, the only contract under which the service was rendered was the implied one that they would pay for the service **at the rate prescribed by law**, seeing that that was the only rate by which the carrier was allowed to render the service."

And, after touching upon the conditions which led to the enactment of the Commerce Act, the decision proceeds:

"Thenceforth, the rates to be charged for transportation were removed from the field of barter and became matters of legal regulation; **the bill of lading became at once little more than a receipt** for the goods to be transported, into which could be legally incorporated nothing obnoxious to the law * * *."

And, quoting from the case of *A. J. Poor Grain Co. v. Chicago etc. Co.*, 12 Inters. Com. Rep. 418, it said:

"Under the force of the * * * (Interstate Commerce Act) the published rate has taken on a fixed and rigid character that does not permit it to yield either to importunity or to mistake * * * Regardless of the rate quoted or inserted in the bill of lading, the published rate must be paid by the shipper and actually collected by the carrier. * * * When once lawfully published, a rate, so long as it remains uncancelled, is fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by a special act of Congress."

In

Pennsylvania R. Co. v. Carolina Portland Cement Co., 16 F. (2d) 760,

in an action to recover demurrage charges (which are part of the transportation charges), the plaintiff therein (*respondent herein*), among other things, argued:

"(3) That the three-year period prescribed by the Act is a mere statute of limitations affecting the remedy which cannot be raised by demurrer."

In overruling this contention, the Court said:

> "We have carefully considered the arguments advanced by the learned counsel of plaintiff, but we do not think that any of the points relied on can be sustained."

And answering respondent's claim with respect to the character of Section 16, 3, of the Act, the Court stated:

> "The cause of action is one which arises out of the statutes of the United States and the action of the Interstate Commerce Commission taken thereunder. (Citing cases.)
>
> The cause of action is one *fixed by the statute* which fixes the time within which such action must be brought as an essential element of the right to sue, and in such cases it is well settled that a declaration or complaint which shows on its face that the action was not brought within the time prescribed is demurrable. (Citing cases.)"

We have already quoted from the Commerce Court decision in *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667, language which included the statement that

> *"the relations between shipper and carrier are no longer contract relations; that the rights and obligations of both are fixed not by mutual agreement but by mandate of the statute."*

In *Galveston, H. & S. A. R. Co. v. Webster*, 27 F. (2d) 765 (supra), which was an action to recover

freight charges due from the shipper based upon a surety bond, in which the question arose whether the state rules and statutes affecting the liabilities of principal and surety were applicable, the Court said in part:

> "The Congress has undertaken in this Transportation Act to definitely fix the time within which carriers in interstate commerce may bring suits for the recovery of freight charges. The suit is one in which the carrier sues to recover charges due it for the transportation of defendant Webster's property in interstate commerce. * * *
>
> "The single subject matter of the suit is the recovery by the carrier of his charges for freight in interstate transport. *Its right to sue is given by the interstate commerce act. * * * the federal law governs.*"

And in the case of *Button v. A. T. & S. F. R. Co.*, 1 F. (2d) 709, which was likewise a case in which the carrier sought to recover a balance due it for freight charges, and in which the provisions of Section 16 (3)(a) were interposed as a defense, the Circuit Court of Appeals, in reversing a judgment for plaintiff, said:

> "There is another ground upon which the case may be rested. Plaintiff's right of action is given by statute. It was not created for its enrichment, but to protect the public against secret rebates and discriminations. It is not a right of contract or of property * * * As to such a right (statutory) the time limit for its enforcement is a constituent

part of the right itself. The lapse of time not only bars the remedy but destroys the liability."

In *Chicago I. & L. Ry. Co. v. Peterson* (Wis.), 169 N. W. 558, the Court said, in an action to recover freight charges on an interstate shipment:

> "The relations between common carriers and shippers are no longer mere matters of contract, but are fixed by the laws and rules regulating such interstate commerce and partake of the nature of statutory obligations." (Citing cases.)

And in another such case,

> *Chicago & N. W. Ry. Co. v. J. L. Case Plow Works,* 180 N. W. 846,

the same Court said:

> *"The right to private contract between shipper and carrier is wholly abrogated by the Interstate Commerce Act, and the rates fixed by law are enforceable by the carrier by force of law."*

That an action by a carrier to recover transportation charges the amount of which depends upon the carrier's tariff, which tariff was prepared, filed, approved and published pursuant to the mandate of the Interstate Commerce Act and the rules and regulations of the Commission, and the collection of which charges was a positive duty imposed upon the carrier by the Act, is an action based upon the Act has been definitely held in the following cases:

> *Vicksburg etc. R. Co. v. Paup,* 47 F. (2d) 1069;
> *Peninsula Products Ex. v. New York P. & N. R. Co.,* 137 Atl. 350;

Chicago N. W. Ry. Co. v. J. L. Case etc. Wks., 180 N. W. 846;

American Ry. Express Co. v. American Trust Co., 47 Fed. (2d) 16;

Zang v. Railway Express, 196 N. E. (Ohio) 901;

Allen v. New York etc. Ry. Co., 15 F. (2d) 532.

VIII.

THE DISSENTING OPINION RENDERED IN THE PRESENT CASE, BEFORE THE CALIFORNIA DISTRICT COURT OF APPEAL, IS CONSISTENT WITH THE LAW AS LAID DOWN BY THE DECISIONS OF THIS COURT.

In respondent's brief the majority opinion written by Marks, Judge, Associate Justice, District Court of Appeal, California, Fourth Appellate District (R., 171, at 177) is quoted as supporting respondent's position. In this connection we might appropriately call the Court's attention to the fact that in affirming the judgment of the trial Court the Court of Appeals was not unanimous, two opinions having been written. The majority opinion is not only at variance with the dissenting opinion but antagonistic to the decisions of this Court, as well as all federal Appellate Courts and, with the exception of the *Susquehanna* case, the decisions of all Federal Courts.

The dissenting opinion, to which we invite the Court's attention (R., 179-191, 124 Pac. (2d) 907-913) is not only in harmony with controlling decisions, both federal and state, but in our opinion its

reading must convince this Court that it apparently was written as the opinion of the Court. Strange as it may appear, the worth of this dissenting opinion is attested in the majority opinion by the following language found in the majority opinion:

> "The facts of this case are clearly and fairly stated in the opinion prepared by Mr. Justice Pro Tem. Schottky and need not be repeated here. He also cites the leading cases on the question presented, though we believe a somewhat closer examination of some of them is advisable." (R., 171.)

The reproduction here of this dissenting opinion would unduly enlarge this brief, but we commend it to the consideration of this Court for the reason that it is in accord with the decision of this and other federal tribunals, and clearly and succintly points out the legal propositions as well as the decisions supporting them by which the determination of this controversy should be controlled.

DISCUSSION OF RESPONDENT'S CITATIONS.

ANALYSIS OF DECISION OF PENNSYLVANIA R. CO. v. SUSQUEHANNA C. CO. DESTROYS ITS USEFULNESS AS A CONTROLLING AUTHORITY.

The respondent herein, as well as the lower Court, relies principally upon the decision rendered by an Ohio District Court in *Pennsylvania R. Co. v. Susquehanna C. Co.*, 23 Fed. (2d) 499, in passing upon a demurrer to plaintiff's complaint, which decision, as heretofore indicated by petitioner, contains no citation

of authority and, although decided in 1927, over seventeen years ago, has never been cited in any textbook or subsequent decision.

In the lower Court it was asserted by respondent that

> "since it had presented the exact question to the federal court and received a decision sustaining the exact type of agreement here involved it was perfectly natural for respondent to follow the principles determined."

It would seem to us, however, that if respondent herein was justified in relying upon any Court determination for the protection of its alleged rights, in lieu of acting upon the ruling of a trial judge in passing upon a demurrer, it would have preferred to rely upon the decision of the Federal Court of Appeals rendered in the case of

> *Pennsylvania R. Co. v. Carolina Portland Cement Co.*, 16 Fed. (2d) 760,

in which case the plaintiff (respondent herein) contended that

> "the three-year limitation period provided for by said Section 16, 3, of the Act did not apply to demurrage charges, and also that it was a mere statute of limitations affecting the remedy which could not be raised by demurrer",

with respect to which the Circuit Court of Appeals (4th District) in reversing the judgment in favor of plaintiff, after holding that causes of action to recover demurrage or storage charges (transportation charges) were within the terms of the statute said:

> *"The cause of action is one created by statute which fixes the time within which action must be brought as an essential element of the right to sue,* and in such cases it is well settled that a declaration or complaint which shows on its face that the action was not brought within the time prescribed is demurrable." (Citing *Phillips v. Grand Trunk R. Co.,* 236 U. S. 662, 59 L. Ed. 774.)

In our brief accompanying the petition filed herein we commented upon certain of the anomalous features of the Susquehanna decision which need not here be repeated, but which, if no other reason existed, would at least impair its value as an authority. However, inasmuch as so much reliance is placed upon it by respondent and by the lower Court, we will briefly analyze the principles therein enunciated upon which the Court's order overruling the demurrer was predicated and test their accuracy by decisions of Appellate Courts, and thus demonstrate that the decisions in the *Susquehanna* case not only lacked support in, but is so opposed to the determination of federal appellate tribunals that as an authority on the legal proposition here involved, it is utterly destroyed.

Claim of defendant in Susquehanna case confined to but one point. Other points here made neither raised nor considered by Court.

A reading of the decision in the *Susquehanna* case will disclose that the SOLE contention of the defendant therein was that

> "the right to recover demurrage charges was one conferred by statute",

and that therefore the suit to recover such charges had to be brought within the statutory period which could not be prolonged by waiver of the statute. It was not contended in that case, as claimed here, that

1. Regardless of whether the right was conferred by statute or by contract, nevertheless Section 16 of the Act destroyed the right of action as well as barred the remedy.

2. That said Section 16 applied to *every* cause of action therein referred to, regardless of how it originated or whether a common law action, provided it was an action *at law* being asserted against or by a common carrier *subject to the Interstate Commerce Act.*

3. That the statute with respect to the controversies to which it applies, *by its very terms,* as construed by the Court, destroyed the liability or the cause of action upon the expiration of the period therein prescribed, or

4. That the words *"and not after"* were inserted in Section 16 by Congress for the definite purpose of destroying the liability therein referred to, unless an action was instituted to enforce it within the time prescribed, and prohibited the extension of such period to prevent preferences and discriminations.

None of these considerations, which in whole or in part constituted the basis for the decisions relied on by petitioner herein, was given consideration or determinated by the Court. It can thus be readily understood that for these, if for no other reasons, the

Susquehanna case is of no importance as an authority. But other and equally as cogent reasons exist why this "relied on" decision should be discarded as a controlling precedent.

Legal principles enunciated in Susquehanna decision are not only unsupported by but are antagonistic to declarations of Appellate and other Courts.

In analyzing this decision we intend first to state each legal provision announced by the Court and then direct this Court's attention to the decisions clearly antagonistic to the propositions thus declared.

Proposition 1. The Court said:

> "* * * plaintiff's right to recover demurrage charges is not a right conferred by the Interstate Commerce Commission and is not within the authorities relied on by defendant. * * * plaintiff's right of action arises out of contract."

That this statement is in opposition to the law as established by this Court and other Appellate Courts is readily observable from an examination of the following authorities most of which have been heretofore cited by us herein:

Pennsylvania R. Co. v. Carolina Portland Cement Co., 16 Fed. (2d) 760, supra;

Arkansas Fertilizer Co. v. United States, 193 Fed. 667 (decision by five judges of Commerce Court);

Galveston etc. v. Webster, 27 Fed. (2d) 765;

Button v. A. T. & S. F. Ry. Co., 1 Fed. (2d) 709;

Kansas City S. R. Co. v. Wolf et al., 261 U. S. 133, 67 L. Ed. 671;

Vicksburg etc. R. Co. v. Paup, 47 Fed. (2d) 1069;

A. J. Phillips Co. v. Grank Trunk R. Co., 237 U. S. 662, 59 L. Ed. 774;

Peninsula Prod. Exchange v. N. W. P. & N. R., 137 Atl. 360;

Chicago I. & L. Ry. v. Peterson, 169 N. W. 558;

Chicago N. W. R. Co. v. J. I. Case etc. Wks., 180 N. W. 846;

W. H. Blodget Co. v. New York C. R. Co., 159 N. E. (Mass.) 45.

Proposition 2. Plaintiff's right of action arises out of contract, even though demurrage charges, like tariff rates, must be prescribed in a tariff filed with the Interstate Commerce Commission and cannot be departed from or varied by the parties either before or after the service is performed.

It will be observed that although the Court recognized that the "demurrage charges, like tariff rates", had to be prescribed by a tariff filed with the Interstate Commerce Commission, yet it held that a cause of action based thereon was nevertheless a right of action growing out of contract. This conclusion is likewise directly in the face of the decisions.

The bill of lading which the Court undoubtedly characterized as a contract between the parties is what is known as a "uniform bill of lading" prescribed by the Interstate Commerce Commission under authority

conferred upon it by the Act. The bill of lading (Section 7) provides:

> "The owner of assignee shall pay the freight and average, if any, and all other lawful charges accruing on said property * * *. The consignor shall be liable for the freight and all other lawful charges except * * *."

It will therefore be seen that the so-called contract is based upon the act and its form and substance are prescribed by the order of the Commission. It therefore occupies the same status as does the tariff upon which the freight charges are based.

That such is the law is pointed out in:

Arkansas Fertilizer Co. v. United States, 193 Fed. 667 (supra);

Galveston etc. v. Webster, 23 F. (2d) 765 (supra).

Proposition 3 (language of the Court):

> "The cases cited under other provisions of the same section (16 (3)) have no application. In these cases the right of action did not grow out of contract, but out of the statute. No right of action existed except until and as the Interstate Commerce Commission made a finding of certain facts."

The Court evidently was of the opinion that it was only in those actions where the amount sought to be recovered *was based upon a finding of the Interstate Commerce Commission*, that the action was barred within the time prescribed regardless of whether the parties had executed an agreement waiv-

ing such statute. That such is not and cannot be the law must be apparent.

Where it is claimed that freight charges are excessive and unreasonable, the action of the Commission can be invoked. The finding of the Commission merely determined the freight rate which should have been specified in the tariff of the carrier and substitutes such rate for the rate contained in the tariff. The action to recover the freight charges, if brought by the carrier, or the overcharge, if brought by the shipper, is necessarily based upon the services rendered in transporting the shipper's commodities as reflected by the substituted tariff rate.

This Court will recall that in construing subdivision (c) of Section 16 of the act, in *Phillips v. Grand Trunk R. Co.*, 236 U. S. 662, held that it applies to *an action at law* as well as to a proceeding before the Commission. This is also pointed out in *Kansas City So. Ry. Co. v. Wolf*, 261 U. S. 133, supra.

See also

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 Fed. (2d) 459.

But there is still a later portion of the decision thus relied on by respondent and the lower Court which, although not pertinent here, discloses a schism not alone between such Court and other and higher Courts, but between it and respondent herein, which should properly be given consideration by this Court in reaching a conclusion respecting the importance to be given to the decision in the *Susquehanna* case. In concluding its decision the Court said:

Proposition 4 (language of the Court):

> "In view of this conclusion it is unnecessary to consider whether a right *created by statute with the condition annexed that it shall be enforced within a limited period, as suits for wrongful death or actions on a reparation award of the Interstate Commerce Commission,* may be kept alive by a voluntary agreement of the parties. *It is difficult, however, to conceive any sound reason why it may not.* Certainly none of the cases cited so hold."

It has always been conceded by respondent, and it was determined by the Court below, that where a right of action was created by statute and it is therein provided that an action to enforce such right must be commenced within a time specified, upon the expiration of such period the obligation as well as the remedy is destroyed. In its decision upon this subject the California Supreme Court in present case, *Pennsylvania R. Co. v. Midstate etc. Co.*, 21 Cal. (2d) 243 at 249, stated:

> "The general rule governs unless the action is created by statute and the language of definition requires a construction that the cause of action is destroyed by the lapse of the period of limitation provided by the statute. Under that exception to the rule the expiration of the time within which such suit must be brought operates to terminate the obligation as well as to bar the remedy."

CASES RELIED ON BY RESPONDENT IN ITS ANSWER TO PETITIONER'S BRIEF FILED WITH THE PETITION ARE NEITHER CONTROLLING NOR APPLICABLE.

On page 6 of respondent's brief filed in opposition to petition for writ of certiorari three cases are cited.

Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59, 68 L. Ed. 900, arose prior to the amendment of the Interstate Commerce Act which made the consignor liable for all freight charges if not otherwise paid. Furthermore, its decision was prior to the inclusion within the Act of its existing limitation provisions. In our opinion, the citation of this authority is unfortunate for respondent for the reason that in the opinion of Mr. Justice Brandeis the following is stated:

> "The shipment, being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. THUS THEY WERE FIXED BY LAW. No contract to the carrier could reduce the amount legally payable or release from liability a shipper who had assumed an obligation to pay the charges."

It was further held, however, that under the law, as it then existed, the parties could contract as between themselves with respect to the liability of the transportation charges, the Court saying:

> "But delivery of the goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation

> to pay the freight charges. The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were free to contract subject to the rule which prohibits discrimination."

The transaction upon which the action was predicated occurred in January, 1917, and it was under the law as it then existed that the decision was rendered. On February 28, 1920, subdivision 2 of section 3 of the Act (Title 49, U. S. C. A. 3(2)) was amended so as to read:

> "No carrier by railroad, subject to the provisions of this chapter, shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination."

It is not, and cannot be claimed, that any rule or regulation of the Commission converted any uniform bill of lading into a private contract between the parties which could be changed *ad lib.*

Furthermore, Ex-Parte Order No. 73 issued by the Interstate Commerce Commission, of which this Court will take judicial notice, contains the following provisions:

> "It is Ordered: That the following rules and regulations be, and they are hereby, prescribed to become effective on July 1, 1920, and remain in force until the further order of the Commission:

1. Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to insure payment of the tariff charges *within the period of credit herein specified,* may relinquish possession of the freight in advance of payment of the tariff charges thereon, and may extend credit in the amount of such charges to those who undertook to pay such charges, such persons being called herein shippers, for a period of ninety-six hours, to be computed as follows: * * *

5. The mailing by the *shipper* of *valid* checks, drafts or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit."

Not only did respondent violate the Act, as well as the bill of lading and the Commission's regulations, but without notice to petitioner it continued making deliveries of the grapes being transported on the same basis until all of the shipments had been received by the Jerome Company.

Additionally, a construction of Section 16, (3)(a) was not involved.

The two remaining cases are equally inapplicable. The decision in *New York C. R. Co. v. Mutual Orange Distributors,* 265 U. S. 59, antedates the adoption of Section 16, (3)(a) of the Act by two years, and it is

therefore obviously not here applicable. In the absence of any federal enactment upon the subject the state statute of limitations applies. The point involved in the action just referred to was which section of the California statute of limitations applied.

In *Atchison T. & S. F. R. Co. v. Hunt Bros. Packing Co.*, 34 Fed. (2d) 582, a decision by a Missouri District Court, although decided after the adoption of the pertinent act, goes no farther than to hold that a consignor is primarily liable for freight charges unless the bill of lading says otherwise.

ALLEGED WAIVER OF LIMITATION STATUTE VOID BECAUSE PROHIBITED BY INTERSTATE COMMERCE ACT AS A DISCRIMINATION.

That the attempted waiver here under consideration was ineffectual and void because it violated the spirit as well as the letter of the Interstate Commerce Act, particularly Section 16 (3)(a), is made manifest in petitioner's brief accompanying its petition, and requires no elaboration. (Br. Supp. Pet., pp. 31-34.) Whether a specific violation of the Act actually results in a discrimination is unimportant. The condemnation is directed to all acts which may or could result in such discrimination. That a waiver of the character here involved could readily permit discriminations resulting in immeasurable advantage to certain shippers as against others as well as to certain carriers as against others, as indicated upon the pages of petitioner's brief above referred to, is indisputable. As

was well said in the dissenting opinion in the California District Court of Appeal in the present case, written by Judge Schottky:

"We are convinced from the authorities that the conclusion reached by the court in the Susquehanna case is opposed to the great weight of authority. We believe that it was the intention of Congress in fixing the limitation of 'within three years and not after' to guard against the circumvention of one of the chief purposes sought to be achieved by the enactment of the Interstate Commerce Act, namely, the prevention of preferences and discriminations among persons, firms, corporations and localities. We believe further that under the decisions of the United States Supreme Court and various United States circuit courts and district courts, we are compelled to hold that when Congress provided in the Interstate Commerce Act that 'all actions at law by carriers subject to this chapter for recovery of their charges, * * * shall be begun within (fol. 293) three years from the time the cause of action accrues and not after', it meant that carriers should not grant preferences for delaying for a long period of time the enforcement of the payment of charges, and therefore intended to provide, and did provide, that unless the action was commenced within the three-year period, the carrier would lose the right to collect them by action. In construing this section we must have in mind the paramount purpose of the Interstate Commerce Act, and when we have that purpose in mind, that it was an act to protect the public against rebates and discriminations, it is not difficult to understand why the federal courts have,

with the single exception of the Susquehanna case, held that the period provided for the commencement of actions thereunder was different from the ordinary statute of limitations created for the benefit of the debtor, who could waive it, because it was simply a matter which concerned the parties to the action.

"It may be that in some cases the waiver of the statute will not result in undue or unreasonable preference or discrimination. However, that is a question that goes to the wisdom or policy of the act, and, as was said by Mr. Justice Field, later a justice of the Supreme Court of the United States (fol. 294) in Ex parte Newman, 9 Cal. 502, 520,

> 'It is not for the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution.'

"We conclude, therefore, that under the provisions of section 16, 3(a), upon the expiration of the period therein prescribed within which action must be taken by the carrier, the cause of action is destroyed and the court's jurisdiction over the matter is terminated; and that neither the carrier nor the shipper can legally waive the provisions of said section, nor extend the period within which an action must be instituted, and that any such waiver or agreement to forebear is contrary to the plain policy of the act and is therefore against public policy and void."

CONCLUSION.

It is respectfully but with confidence submitted that for the reasons herein, and in the brief filed in support of petitioner's application for certiorari, set out, that the opinion rendered by the Supreme Court of the State of California is contrary to the decisions of this and other federal tribunals; that it is legally unsupportable, and that the judgment entered in this case by the lower Court should be reversed.

Dated, San Francisco,
October 4, 1943.

HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Attorneys for Petitioner.

THEO. J. ROCHE,
GEORGE A. STOCKFLETH,
Of Counsel.

FILE COPY

Office - Supreme Court, U.
FILED
MAY 11 1943
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 913.

MID-STATE HORTICULTURAL CO., INC., *Petitioner*,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

On Petition by Mid-State Horticultural Co., Inc. for Writ of Certiorari to the Supreme Court of California.

BRIEF ON BEHALF OF RESPONDENT, THE PENNSYLVANIA RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
G. BOWDOIN CRAIGHILL,
CAESAR L. AIELLO,
R. AUBREY BOGLEY,
JOHN E. LARSON,
For Respondent.

WM. F. ZEARFAUS,
W. H. STAMMER,
GALEN MCKNIGHT,
Of Counsel.

SUBJECT INDEX.

	Page
Opposition to Petition	1
General Statement of Case	2
Petitioner requested extension of time to investigate claim and waived limitation of action Exhibit "C", Rec. 39	2
The action is *ex contractu* to collect agreed charges as at common law	3
Performance in full by Respondent Admitted	3
Petitioner contends legal inability on its part to waive provisions of Sec. 16 par. (3)(a) of the I. C. C. Act, as amended 1902, and so presented only question for decision in the case	3, 4
Limitations may be waived in action on contract	4

So decided in District Court of Appeal, California, herein below, Marks J., see Rec. 171.

And Affirmed by Supreme Court of California, Shenk J., without dissent Rec. pp. 196-204.

CODES AND CASES CITED.

Atchison, Topeka & Santa Fe Ry. Co. v. Hunt Bros. Fruit Co., 34 Fed. (2d) 582	6
Gamble-Robinson Commission Co. v. Chicago & N. W. Ry Co., 168 F. 161	8
Louisville & Nashville R. R. Co. v. Central Iron & Coal Co., 265 U. S. 59	3, 6
New York Central R. R. Co. v. Mutual Orange Distributors, 251 Fed. 230	6
Pennsylvania R. R. Co. v. Susquehanna Collieries, 23 Fed. (2d) 499	4, 6
Phillips v. Grand Trunk Ry. Co., 236 U. S. 662	4
U. S. Code Anno., Title 49, Sec. 3, Par. 1	7
U. S. Code Anno., Title 49, Sec. 6, Par. 7	1
U. S. Code An., Title 49, Sec. 16, Par. 3, Note	6
U. S. Code Anno., Title 49, Sec. 2 and Sec. 6, Par. 7	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 913.

MID-STATE HORTICULTURAL CO., INC., *Petitioner*,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

OPPOSITION TO PETITION FOR CERTIORARI TO SUPREME COURT OF THE STATE OF CALIFORNIA.

Respondent, The Pennsylvania Railroad Company, opposes the petition for certiorari and respectfully submits to this Court that the transcript of the record filed in support of the petition discloses no ground whatsoever under Rule 38 or any other rule of this Honorable Court for issuance of the writ. Looking through the legal verbiage to fundamental facts, this case is revealed as a direct attempt by petitioner to avoid the payment of freight charges, for interstate shipments already made, in violation of Section 6, Par. 7, of the Interstate Commerce Act (U. S. Code Anne., Title 49, Sec. 6, Par. 7).

All of the carloads of grapes in question were shipped by petitioner from California to New Jersey under written bills of lading signed by petitioner, which named petitioner as both consignor and consignee and which specified the exact bases for the computation of the freight charges. Petitioner, the owner of the grapes, ordered the cars diverted to its agent, Jerome Distributing Company, and Respondent delivered the cars in accordance with Petitioner's orders (R. 1, f. 2 & 3; R. 51, f. 72).

Petitioner's said agent gave respondent bank checks to cover the freight charges. These checks were dishonored by the bank and the freight charges have never been paid (R. 100, f. 153, to R. 104, f. 160).

The written bills of lading provided that the owner or consignee should pay the freight (R. 38B). Petitioner, as owner and actual consignee, was thus liable for the freight charges. It knew that its agent's checks had been dishonored and the freight charges unpaid as early as June, 1933, but it has consistently refused to pay them since.

The three-year period of limitations prescribed in Section 16, Par. (3)(a), of the Interstate Commerce Act expired on October 28th, 1935. Prior thereto, respondent had attempted to collect the freight charges from petitioner and had threatened and intended to institute suit against it for that purpose. Petitioner requested Respondent to delay suit to give Petitioner further opportunity to investigate the claim.

On October 25th, 1935, Petitioner executed and delivered to Respondent the agreement marked Exhibit "C" and set forth at large Record pp. 39-41 in which petitioner waived the defense of any general or special statute of limitations. This agreement was not signed by Respondent carrier but recited that respondent was willing, in the hope that Petitioner might conclude to pay the claim without litigation, to defer the institution of suit until January 1st,

1936, or until such earlier date as the petitioner might definitely refuse to pay the claim (R. 40, f. 53-c).

After the three-year period fixed in the Interstate Commerce Act had expired, petitioner refused to pay any of the agreed freight charges—not because it had concluded that it was not legally responsible for them, but because it had decided to violate its agreement not to plead the statute of limitations. Respondent instituted this action, about two months after the statutory period had run on the earliest car delivered and slightly over one month after the statutory period had run on the last car delivered.

The action is a simple contract action, brought by Respondent, as carrier, to collect from Petitioner, as owner and consignee, the freight agreed in the written bills of lading, which were pleaded by attaching copies thereof to the complaint.

Petitioner, by its answer, admitted performance of all contracts and of every fact essential to establish its obligation to pay the freight charges claimed (R. 51, f. 72, to R. 52, f. 73). It did attempt also to plead estoppel on part of Respondent to collect the freight charges, but that defense was properly and promptly stricken from its said answer, Petitioner conceding it not to be available in an action to collect freight charges.

Louisville & Nashville R. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59.

In violation of its agreement and for the sole purpose of avoiding its liability for freight charges, petitioner pleaded, as its sole real defense, the provisions of Section 16, Par. (3)(a), of the Interstate Commerce Act, as amended in 1920, taking the position that its agreement waiving that statute was void. The validity of that agreement under the facts of this case is the sole question which petitioner can properly present to this Court on this petition.

The Supreme Court of California, in its opinion herein (R. 196 to 204), held this action to be one ex contractu,

that Section 16, Par. (3)(a), of the Interstate Commerce Act, as sought to be here applied constituted a statute of limitations, and that petitioner's waiver of the provisions of that statute was valid. In so deciding, the California Supreme Court followed generally recognized principles of applicable law and decisions of this Court.

It is the almost universally recognized rule in America that a statute of limitations may be waived in an action on contract. That this general principle applies to Section 16, Par. (3)(a), of the Interstate Commerce Act in contract actions by carriers for the recovery of their freight charges was directly determined in *Pennsylvania R. R. Co. v. Susquehanna Collieries*, 23 Fed. (2d) 499 which is the only reported case in which a Federal court considered facts identical with those in the instant case and determined the effect of a written waiver by a shipper of said section of the Interstate Commerce Act.

There can be no doubt as to the soundness and general acceptance of the principle of law stated and applied in the *Susquehanna* case and reaffirmed and applied in the opinion of the Supreme Court of California in the instant case.

Indeed, this argument in opposition to Petitioner's prayer for the granting of Writ of Certiorari in the instant cause might well be rested upon the opinions of the District Court of Appeals, California, set forth in full at pages R. 171-179, per Marks J. and approved unanimously (judgment affirmed R. 204) by the Supreme Court of California at pages R. 196-204, without more of either statement or argument.

Petitioner seeks to avoid the application of those rulings by claiming that the Supreme Court of California should have followed the ruling of this Court in *Phillips v. Grand Trunk Ry. Co.*, 236 U. S. 662. But it is apparent from an examination of this Court's opinion in that case that the facts there involved were different from those in the in-

stant case and called for the application of different principles of law. In the Phillips case the action was brought by a shipper for the recovery of excessive freight charges and was based directly upon an order of the Interstate Commerce Commission entered after procedure provided for in the Interstate Commerce Act. The cause of action pleaded by the plaintiff in the Phillips case was one created originally by the Interstate Commerce Act and was purely statutory in origin and nature. The plaintiff had failed to file his complaint within the period fixed in Section 16 of the Interstate Commerce Act, which then applied only to actions created by the Interstate Commerce Act in favor of shippers. No written waiver of the statute was involved. This Court held, in effect, that Congress having created a new cause of action in favor of shippers and having in the same statute provided a time limit for the filing of actions thereon, the cause of action, no suit having been brought, was destroyed by the lapse of the time specified in the enabling statute, and that the various state statutes of limitation were not applicable.

This Honorable Court thus applied to the peculiar facts in the Phillips case the generally recognized principle of law that when a statute creates a legal liability, with a right to suit for its enforcement, provided such suit be brought within a designated period, the time within which the suit must be brought operates as a limitation of the liability itself, and not of the remedy alone.

All of the other cases cited and relied upon by petitioner are similar cases, involving causes of action created by a statute. None of them rests in simple contract or involves an agreement waiving the statute of limitations applicable to such type of action.

There is no provision in the Interstate Commerce Act, as amended A. D. 1920, which creates any cause of action in favor of a carrier as against a shipper for its freight

charges, for the simple reason that Congress well knew that such cause of action already existed at common law. In fact, when the Interstate Commerce Act was adopted no period of limitation was specified for the bringing of actions by carriers for the recovery of their charges. Section 16(3)(a), applicable to the present case, was not a part of the original Interstate Commerce Act, was not in existence when the Phillips case was decided, and was not added to the Interstate Commerce Act until the adoption of the Transportation Act of 1920 (U. S. Code Ann., Title 49, Sec. 16, Par. 3, Note).

That an action upon a written bill of lading for freight charges is one upon contract, and not one created by statute, has been determined by this Court and the Circuit Courts of Appeal.

Louisville & Nashville R. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59.
New York Central R. R. Co. v. *Mutual Orange Distributors*, 251 Fed. 230.
Atchison, Topeka & Santa Fe Ry. Co. v. *Hunt Bros. Fruit Co.*, 34 Fed. (2d) 582.

It was for such very cogent reasons without doubt that the District Court in *Pennsylvania R. R. Co.* v. *Susquehanna Collieries*, 23 Fed. (2d) 499, and the Supreme Court of California in this case did not apply the particular rule enunciated by this Honorable Court in the Phillips case but applied the generally recognized rule that ordinarily statutes of limitations may be waived.

Petitioner finally argues that this waiver of the limitation provision in the Interstate Commerce Act *of itself* constituted a discrimination in violation of the Interstate Commerce Act. Petitioner in its answer did not plead, nor did it prove at the trial, any discrimination or preference, or any misuse or abuse of such agreements by this carrier or any carrier.

The preferences defined as unjust discriminations and prohibited by the Interstate Commerce Act are the charging, demanding, collecting or receiving by any carrier *from any person* of a greater or less compensation for any service rendered in the transportation of passengers or property than the carrier charges, demands, collects or receives *from any other person* for a like contemporaneous service (U. S. Code Anno., Title 49, Sec. 2 and Sec. 6 Par. 7). The pleading and proofs here show that Respondent charged Petitioner for the services rendered it, the exact charge specified in its published tariffs and charged to every other shipper. Respondent, The Railroad Company, seeks but to enforce this provision of the Act by collecting its lawfully prescribed freight charges. Petitioner, who claims to abhor discrimination, seems determined to violate this provision of the Act and to profit by the unjust discrimination which will inevitably result, if it is permitted to ship its goods in interstate commerce without payment of the lawfully prescribed tariff rates for such service.

The pleading and proofs in this record do not indicate that any preference whatsoever was sought or given on part of Respondent. Petitioner had requested additional time within which to determine whether to pay the claim without suit or to attempt a defense. Its voluntary waiver of the so styled period of limitations constituted no preference and relieved it from no liability. It was entirely in aid of the collection of the prescribed freight charges by the Respondent-Carrier.

But even if preference could be said to have resulted from extending time for filing action for a period of two months, such preference would not invalidate the waiver. Preferences other than those specifically forbidden by Section 2 and Section 6, Par. 7, of the Interstate Commerce Act are permitted by the Act unless they are undue or unreasonable (U. S. Code Anno., Title 49, Sec. 3, Par. 1). It is elementary that the Interstate Commerce Act does not de-

nounce every preference, but only such as are undue or unreasonable. The right to accept a waiver agreement is quite similar to the right to require prepayment of freight from one shipper and to extend credit in like case to another, which was held (*Gamble-Robinson Commission Co.* v. *Chicago & N. W. Ry. Co.*, 168 F. 161) to be proper and not to subject the second shipper to undue or unreasonable prejudice or disadvantage under section 3 of the Interstate Commerce Act.

The pleadings and proofs in this action do not disclose that any preference whatever was either granted or sought to be granted to the Petitioner by the Respondent Railroad Company.

Petitioner, being in fact both shipper and consignee, and owner, requested the Interstate carrier to withhold action under the statute until, in the seeming doubtful circumstances, it might investigate and determine whether the carrier's claim should be paid without suit or a defense based on payment supposedly previously made should be interposed.

Petitioner's voluntary tender and waiver of its contractual right of limitation of action when accepted by the Carrier-Respondent was at most but the surrender for value received of a benefit lodged by the statute in the Shipper-Petitioner. It did not, and should not be held to constitute a surrender on part of the Carrier-Respondent of any of its rights to recover its freights and so result in discriminations between shippers which it is and was the purpose of the Interstate Commerce Act to prevent.

Shipper-Petitioner's own and voluntary waiver of some benefit uniquely conferred upon it should not and as we respectfully contend could not rightfully operate as a surrender or negation of an obligatory duty on part of the Carrier-Respondent.

Insofar as the Carrier was concerned, the surrender tendered by shipper was solely in the interest of uniformity.

Petitioner's tender and waiver even if and when accepted constituted no true preference in its own favor and did not relieve, as it quite plainly was not intended to relieve, the Respondent-Carrier from any obligation or duty with respect to the collection of its published tariff charges.

The course pursued in the progress of the controversy through the courts of California was entirely equitable and the results achieved as demonstrated by the opinions and judgments of the Courts of California (R. 171-179 and 196-204) are not only equitable but also formally legal and correct.

As said by Marks J., Associate Justice, District Court of Appeals, California, Fourth Appellate District (R. 171 at p. 177):

> "A study of the act leaves the conclusion that it lacks appropriate language to create in the common carrier a right of action to collect its transportation charges, where no part of them has been paid, separate and distinct from its common law right to bring such an action. Of course, such right of action is recognized, but hardly created, and [fol. 267] recovery is limited to the rates established by the Interstate Commerce Commission.
>
> "The conclusion follows that in a case such as we have here where no part of the transportation charges had been paid and the carrier brings its action to recover all of those charges based on rates established by the Interstate Commerce Commission, the cause of action is one in contract given by the common law to the carrier long before any Interstate Commerce Act was adopted and is not a right of action created by that act. Therefore the limitation in that act does not destroy the right of action by reason of lapse of time, but is merely a limitation on the remedy which may be waived by the shipper.
>
> "There is nothing in any of the cases cited to us that in any manner conflicts with this conclusion. With one exception all of those cases were either by the carrier to recover the difference between the rate paid by the shipper and the higher rate fixed by the commission or by the shipper to recover the difference between the rate paid by the shipper and the lower rate fixed by the

commission. There was no such right of action known to the common law. The cause of action was created by statute."

* * * * *

"If the purpose of the Interstate Commerce Act is to prohibit unjust discrimination by the carrier and to protect the shipper, then certainly the judgment in this case should be affirmed. To do otherwise would be to permit a carrier to give preference to a large shipper by the very procedure here followed. It would not only open the gate but would signpost the way to discriminations and preferences." (R. 179)

* * * * *

"If we assume that the forebearance by the carrier under the written waiver of the shipper was a preference, and that the question is pertinent in this case, it does not follow that the forebearance under the circumstances was either forbidden or unreasonable. The main purpose of the agreement was not to extend credit to the defendant, but was to preserve the rights of the carrier. There is no justification for a conclusion that under the facts in this case the purpose was abused as a cover for extending an unreasonable preference. Moreover, the remedy for the giving of an unreasonable preference is the recovery of damages by the person discriminated against and who has been injured thereby. (Sec. 8, Interstate Commerce Act, 49 U. S. C. A.) An example is Gamble-Robinson Commission Co. v. Chicago, N. W. Ry. Co., 168 F. 161, where an action was brought by a shipper who had not received the same credit terms accorded other shippers. The court said in that case that the Commerce Act left the carrier free to exercise all the rights and privileges under the common law insofar as they were not rendered unlawful by the act; that the act did not make all preferences or advantages unlawful, and that there was nothing unreasonable in requiring prepayment of freight in the case of one shipper and in extending credit to another. If in the present case the defendant's contention in this respect were to prevail, the result would be that the shipper who has been the recipient of the preference would be deemed injured thereby. Certainly he should not be heard to contend that injury to him has resulted because he is compelled

to discharge his liability to pay lawful freight charges —a liability which was created when the shipments were delivered [fol. 311] and has never been discharged. The purpose of the act is to secure equal treatment to all shippers.

"It is founded on a sound public policy. But that policy should not permit the favored shipper to urge discrimination against others for the purpose of enabling it to escape a liability which it was otherwise bound to discharge." (R. 203)

* * * * *

"However, as we have noted, a contract to preserve the carrier's right and duty to collect lawful freight charges as against the running of the statute of limitations, when reasonably exercised, serves to prevent rather than create discrimination among shippers, and in our opinion, should not be deemed violative of the language or purpose of the Interstate Commerce Act." (R. 204)

Nor was the delay in instituting this suit, somewhat less than two months after the expiration of the statutory period in reliance upon the waiver agreement, subject to criticism from the standpoint of preference, any more than would be delay in instituting a similar suit, in the hope of effecting voluntary payment until just before the expiration of such period in the hope that by such delay payment of the charges would be secured by amicable means. The Supreme Court of California dealt with the contention of preference (this phase of the situation) in the following language (R. 203, 204):

"If we assume that the forebearance by the carrier under the written waiver of the shipper was a preference, and that the question is pertinent in this case, it does not follow that the forebearance under the circumstances was either forbidden or unreasonable. The main purpose of the agreement was not to extend credit to the defendant, but was to preserve the rights of th carrier. There is no justification for a conclusion that under the facts in this case the purpose was abused as a cover for extending an unreasonable preference.

> Moreover, the remedy for the giving of an unreasonable preference is the recovery of damages by the person discriminated against and who has been injured thereby. (Sec. 8. Interstate Commerce Act, 49 U. S. C. A.) * * * If in the present case the defendant's contention in this respect were to prevail, the result would be that the shipper who has been the recipient of the preference would be deemed injured thereby. Certainly he should not be heard to contend that injury to him has resulted because he is compelled to discharge his liability to pay lawful freight charges—a liability which was created when the shipments were delivered (fol. 311) and has never been discharged. The purpose of the act is to secure equal treatment to all shippers.
>
> "It is founded on a sound public policy. But that policy should not permit the favored shipper to urge discrimination against others for the purpose of enabling it to escape a liability which it was otherwise bound to discharge."

In the absence of any evidence to establish discrimination or preference, the courts of California have found as a fact that none exists herein. The public interest was served by the decision of the California Supreme Court requiring Petitioner to pay the uniform published tariff rate for the services it had received. There is no question of public interest or of importance presented to this Court for consideration.

Petitioner's statement that to permit such waivers when the carrier is but enforcing the provisions and certain purposes of the Interstate Commerce Act, will result in some radical type of discrimination against shippers in the future, is wholly without merit. If in the future any carrier should grant an undue or unreasonable preference through some waiver of the period of limitations, its conduct would be subject to the control of the Interstate Commerce Commission and the courts. The dire consequences anticipated by Petitioner could only result in the event that

both the Commission and the courts failed to perform their plain duty.

It is submitted that an analysis of the Petition will disclose no true basis for the granting of *certiorari* herein.

It is respectfully submitted the Petition should be denied.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
G. BOWDOIN CRAIGHILL,
CAESAR L. AIELLO,
R. AUBREY BOGLEY,
JOHN E. LARSON,
For Respondent The Pennsylvania Railroad Company.

WM. F. ZEARFAUS,
W. H. STAMMER,
GALEN MCKNIGHT,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 19 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 40.

MIDSTATE HORTICULTURAL COMPANY, INC.
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR RESPONDENT.

JOHN DICKINSON,
WILLIAM F. ZEARFAUS,
JOHN B. PRIZER,
1740 BROAD ST. STATION BLDG.,
PHILADELPHIA, PA.
Counsel for Respondent.

FREDERIC D. MCKENNEY,
W. H. STAMMER,
Of Counsel for Respondent.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA

TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
QUESTION PRESENTED	4
STATEMENT OF THE CASE	5
ARGUMENT	10
I. It is a Basic Principle of the Common Law that the Statute of Limitations May Not be Pleaded Against a Creditor Who Has Refrained From Bringing Suit Within the Statutory Period in Reliance on the Debtor's Promise Not to Plead the Statute	11
II. There Is Nothing, Either on the Face of or in the History of the Provision of the Interstate Commerce Act Limiting the Time Within Which Suits by Carriers to Recover Their Charges May Be Brought, Which Indicates that a Valid Waiver of Such Limitation for a Reasonable Period of Time May Not Be Agreed upon Between the Carrier and the Shipper	16
A. A Carrier's Cause of Action for the Recovery of Freight Charges Due It for Its Transportation Services Is Based Not Upon the Interstate Commerce Act but Upon the Contract of Carriage and the Carrier's Common-Law Rights Thereunder	18
B. There Is Nothing in the Language of the Provision Limiting Suits by Carriers to Recover Their Charges, Which Indicates that a Promise Not to Plead it Shall Not be Valid and Binding	25
C. There Is Nothing in the Legislative History of the Provision Limiting Suits by Carriers to Recover Their Charges, Which Indicates an Intent that a Promise Not to Plead the Limitation Shall Not be Valid and Binding	32
III. There is Nothing in the Policy of the Interstate Commerce Act Which Requires that a Voluntary Agreement Made by a Shipper Not to Plead the Statute of Limitations Should Not be Enforced	37
IV. The Decisions of This and Other Courts Do Not Support Petitioner's Position but on the Contrary Are Consistent with and Support Respondent's Position	50

PAGE

A. Cases Cited as Sustaining Principles of Law Upon Which There is No Dispute in This Case 53

B. Actions by Shippers Against Carriers Asserting Causes of Action Based Upon the Express Provisions of the Interstate Commerce Act 53

C. Actions in Which Private Arrangements Between Shippers and Carriers or Privileges Claimed by Shippers Have Been Held to Constitute Actual Unjust Discriminations or Undue Preferences Contrary to the Express Prohibitions of the Act. 58

D. Actions by Carriers Against Shippers Which Are Distinguishable From the Present Case or Which in Principle Support Respondent's Position in the Present Case 60

V. Respondent Is Not Estopped to Collect the Lawful Charges by Reason of Respondent's Dealings with Petitioner's Agent 71

CONCLUSION 72

TABLE OF CASES.

A. J. Phillips Co. *v.* Grand Trunk Western Ry. Co., 236 U. S. 662, 35 S. Ct. 444 (1915) 24, 25, 50, 53, 55

Allen *v.* New York, P. & N. R. Co., 15 F. (2d) 532 (C. C. A. 4th, 1926) 53

Alton R. Co. *v.* Gillarde, 379 Ill. 308, 40 N. E. (2d) 727 (1942) 21

American Railway Express Co. *v.* American Trust Co., 47 F. (2d) 16 (C. C. A. 7th, 1931) 59

American Railway Express Co. *v.* Shideler, 88 Ind. A. 645, 165 N. E. 336 (1929) 59

Arkansas Fertilizer Co. *v.* United States, (I. C. C. Intervener), 193 Fed. 667 (1911) 53

Atchison, T. & S. F. R. Co. *v.* Robinson, 233 U. S. 173, 34 S. Ct. 556 (1914) 58

Bewley *v.* Power, Hayes & Jones Exchequer Reports 368 (1833) 14, 29

Button *v.* Atchison, T. & S. F. Ry. Co., 1 F. (2d) 709 (C. C. A., 8th, 1924). 23, 61, 66

Central of Georgia Ry. Co. *v.* Birmingham Sand & Brick Co., 9 Ala. App. 419, 64 So. 202 (1913) 39, 72

Central R. R. Co. of N. J. *v.* Mauser, 241 Pa. 603, 88 A. 791 (1913) 60, 63

Chesapeake & Ohio Ry. Co. *v.* Martin, 283 U. S. 209, 51 S. Ct. 453 (1931) .. 59

Chicago & Alton R. *v.* Kirby, 225 U. S. 115, 32 S. Ct. 648 (1912) 58

Chicago, I. & L. Ry. Co. *v.* Peterson, 168 Wis. 193, 169 N. W. 558 (1918) 60, 61

PAGE

Chicago & N. W. Ry. Co. *v.* J. I. Case Plow Works, 173 Wis. 237, 180 N. W. 846 (1921) 39, 60, 62, 72

Cohen *v.* Texas etc. Co., 303 Ill. A. 606, 25 N. E. (2d) 562 (1940) 59

Crane *v.* Abel, 67 Mich. 242, 34 N. W. 658 (1887) 30

Danzer *v.* Gulf etc. R. Co., 268 U. S. 633, 45 S. Ct. 612 (1925) 53

Dickson *v.* Slater Steel Rig Co., 138 Okla. 238, 280 P. 817 (1929) 30

Finn *v.* U. S., 123 U. S. 227, 8 S. Ct. 82 (1887) 27

Galveston H. & S. A. R. Co. *v.* Webster Co., 27 F. (2d) 765 (W. D. Tex., 1928) 23, 60, 64

Gamble-Robinson Com. Co. *v.* Chicago & N. W. Ry. Co., 168 F. 161 (C. C. A. 8th, 1909) 45

Gaylord *v.* VanLoan, 15 Wend. (N. Y.) 308 (1836) 13

Georgia F. & A. R. Co. *v.* Blish Milling Co., 241 U. S. 190, 36 S. Ct. 541 (1916). 58

Howard *v.* West Jersey & S. S. R. Co., 102 N. J. E. 517, 141 A. 755 (1928), aff'd, 104 N. J. E. 201, 144 A. 919 (1929) 14

Hill *v.* Hesse, 126 Cal. A. 171, 15 P. (2d) 526 (1932) 17

In Re Estate of King, 94 Mich. 411, 54 N. W. 178 (1892) 30

Kansas City Southern R. Co. *v.* Wolf, 261 U. S. 133, 43 S. Ct. 259 (1923) . . 24, 59, 53

L. M. Kirkpatrick Co. *v.* I. C. R. Co., 190 Miss. 157, 195 So. 692 (1940) . . . 59

Lade *v.* Trill, 6 Jur. 272 (1842) 14

Louisville & Nashville R. Co. *v.* Cory, 54 F. (2d) 8 (C. C. A. 6th, 1931) 54

Louisville & N. R. Co. *v.* Central Iron & Coal Co., 265 U. S. 59, 44 S. Ct. 441 (1924) 20, 72

McNutt *v.* Bakewell, 223 Pa. 364 (1909) 17

Morgan's L. & T. R. etc. Co. *v.* Cocke, 273 U. S. 656, 47 S. Ct. 342 (1927) . . 53

New York Central R. *v.* Phila. & Reading Coal & Iron Co., 286 Ill. 267, 121 N. E. 581 (1919) 72

N. Y. Cent. R. R. *v.* York & Whitney Co., 256 U. S. 406, 41 S. Ct. 509 (1921) . . 10, 72

New York, N. H. & H. R. Co. *v.* California Fruit G. Exch., 125 Conn. 241, 5 A. (2d) 353 (1939) (cert. den. 308 U. S. 567, 60 S. Ct. 79) 38, 60, 62, 72

Northern Wisconsin P. Co. *v.* Chicago & N. W. R. Co., 203 Wis. 549, 234 N. W. 726 (1931) 59

Oregon-Washington R. & Nav. Co. *v.* Seattle Grain Co., 106 Wash. 1, 178 P. 648 (1919) 23

Partee *v.* St. Louis & S. F. R. Co., 204 Fed. 970 (C. C. A. 8th, 1913) 17

Peninsula Produce Exch. *v.* New York, P. & N. R. Co., 152 Md. 594, 137 A. 350 (1927) 54

Pennsylvania R. Co. *v.* Carolina Portland Cement Co., 16 F. (2d) 760 (C. C. A. 4th, 1927) 61, 69

Pennsylvania R. Co. *v.* Fox & London, Inc., 93 F. (2d) 669 (C. C. A. 2d, 1938) (cert. den., 304 U. S. 566, 58 S. Ct. 949) 22

Pennsylvania R. Co. *v.* International Coal Mining Co., 230 U. S. 184, 33 S. Ct. 893 (1912) 58

PAGE

Pennsylvania R. Co. *v.* Lord & Spencer, 295 Mass. 179, 3 N. E. (2d) 231 (1936) 22

Pennsylvania R. Co. *v.* S. M. Hamilton Coal Co., 144 Md. 556, 125 A. 405 (1923) 59

Pennsylvania R. Co. *v.* Susquehanna Collieries Co., 23 F. (2d) 499 (1927) 50

Pennsylvania Co. *v.* United States, 236 U. S. 351, 35 S. Ct. 370 (1915) 45

Pittsburgh, C. C. & St. L. Ry. Co. *v.* Fink, 250 U. S. 577, 40 S. Ct. 27 (1919) 10, 71

Quick *v.* Corlies, 39 N. J. L. 11 (1876) 30

Randon *v.* Toby, 11 How. 493 (1850) 13

Reading Co. *v.* Sobelman, 144 Pa. Super. Ct. 270, 19 A. (2d) 754 (1941) 23

Rogers *v.* East Carolina R. Co., 186 N. C. 86, 118 S. E. 885 (1923) 59

St. Louis Southwestern Ry. Co. *v.* Gramling, 97 Ark. 353, 133 S. W. 1129 (1911) 23

Shroyer *v.* Chicago etc. R. Co., 111 Tex. 241, 222 S. W. 1095 (1920) 59

Smith *v.* Dupree, 140 S. W. 367 (Ct. Civ. App. Tex., 1911) 30

Spartan Mills *v.* Davis, 126 S. C. 312, 119 S. E. 905 (1923) 59

Texas and Pacific Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 197 16 S. Ct. 666 (1896) 44

Texas & Pac. Ry. Co. *v.* Leatherwood, 250 U. S. 478, 39 S. Ct. 517 (1919) 59

The Harrisburg, 119 U. S. 199, 7 S. Ct. 140 (1886) 16

United States *ex rel.* L. C. Co. *v.* Interstate Com. Com., 246 U. S. 638, 38 S. Ct. 408 (1918) 53

U. S. *ex rel.* Texas Portland Cement Co. *v.* McCord, 233 U. S. 157, 34 S. Ct. 550 (1914) 17

Vicksburg etc. R. Co. *v.* Paup, *et al.*, 47 F. (2d) 1069 (C. C. A. 5th, 1931) 60, 65

W. H. Blodget Co. *v.* New York Central R. Co., 261 Mass. 365, 159 N. E. 45 (1927) 59

Warren *v.* Walker, 23 Me. 453 (1844) 14

Webber *v.* Williams College, 23 Pick. (Mass.) 302 (1840) 14

Western Union Telegraph Co. *v.* Esteve Bros. & Co., 256 U. S. 566, 41 S. Ct. 584 (1921) 59

William F. Mosser Co. *v.* Payne, Director etc., 192 W. Va. 41, 114 S. E. 365 (1922) 59

Wisconsin Bridge & Iron Co. *v.* Illinois Terminal Co., 88 F. (2d) 459 (C. C. A. 7th, 1937) 23, 61, 65

Zang *v.* Railway Express Co., 130 Oh. St. 17, 196 N. E. 901 (1935) 54

TABLE OF INTERSTATE COMMERCE COMMISSION REPORTS.

Boise Commercial Club *v.* Adams Express Co., 17 I. C. C. 115 (1909) 48

In Re Express Rates, Practices, Accounts and Revenues, 24 I. C. C. 380 (1912) 48

Wisconsin Bridge and Iron Co. *v.* Illinois Term. Co., 169 I. C. C. 197 (1930) 65

TABLE OF MISCELLANEOUS AUTHORITIES.

	PAGE
Angell on Limitations, 6th Ed., Appendix, p. 504	28
Chitty's English Statutes, 6th Ed., Vol. 7, pp. 618–19, pp. 629–632	28, 29
Coke's Second Institutes 94-96	28
Columbia Law Review, Vol. 30, p. 338	15
Hearings before Committee on Interstate and Foreign Commerce of the House of Representatives, 66th Congress, First Session on H. R. 4378, pp. 2898–99	35
H. R. Conference Report No. 650, accompanying H. R. 10453, 66th Congress, Second Session	35
Irish Statutes, Vol. 2, pp. 54–55	29
I. C. C. Annual Report for 1933, pp. 80–81	33
Restatement of Contracts, Secs. 86 (2) (c), Comment and 90	12
Williston on Contracts (Rev. Ed., 1936), Secs. 183, 184, 689	12, 15
Wood on Limitations (4th Ed., 1916), Sec. 76	12, 15

TABLE OF STATUTES.

Ala. Code, 1940, Tit. 7, Sec. 18	31
Ariz. Code, 1939, Secs. 29–203, 29–205, 29–206	31
Ark. Pope's Digest of Stats., 1937, Ch. 102, Secs. 8928, 8933	31
Colo. Ann. Stats., 1935, Ch. 102, Sec. 1	31
Ind. Burns' Ann. Stats., 1933, Secs. 2–601, 2–602	31
Interstate Commerce Act,	
Act of Feb. 4, 1887, 24 Stat. 379	2
Act of June 29, 1906, 34 Stat. 584	32
Act of Feb. 28, 1920, 41 Stat. 456	32, 35
Act of June 7, 1924, 43 Stat. 633	6, 25, 32, 35
Act of Sept. 18, 1940, 54 Stat. 952	35
Judicial Code, Sec. 237 (28 U. S. C. 344 (a) and (b))	2
Mich. Comp. Laws, 1871, Sec. 7148	30
Miss. Code, 1930, Ch. 45, Sec. 2299	31
N. H. Rev. Laws, 1942, Ch. 385, pars. 3, 4	31
N. M. Stats. 1941, Sec. 27–101	31
Okla. Rev. Laws, 1910, Sec. 4657 and Okla. Ann. Stat., Tit. 12, Sec. 95	30
R. I. Gen. Laws, 1938, Ch. 510, Sec. 3	31
Statute of Merton, 20 Hen. III. c. 8	28
Statute of 32 Hen. VIII. c. 2	28
Statute of 31 Eliz. c. 5	28
Statute of 21 James I. c. 16	28, 29
Statute of 10 Charles I. c. 6	29
Statute of 9 Geo. IV. c. 14	29
Tex. Rev. Stats., 1895, Art. 3356; Tex. Rev. Civ. Stat. 1925, Art. 5526	30
Vt. Pub. Laws, 1933, Ch. 72, Sec. 1648	31
Va. Code, 1942, Sec. 5810	31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943. No. 40.

Midstate Horticultural Company, Inc.
Petitioner,

v.

The Pennsylvania Railroad Company
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court of Appeal, Fourth District, California (R. 171-79), and the dissenting opinion of Mr. Justice Pro Tem Schottky (R. 179-91), were published on April 16, 1942, and are not officially reported but will be found in 124 P. (2d) 902. The unanimous opinion of the Supreme Court of California (R. 196-204) was published on November 27, 1942, and is reported at 21 Cal. (2d) 243, 131 P. (2d) 544.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under Section 237 of the Judicial Code, as amended (28 U. S. C. 344 (a) and (b)).

STATUTE INVOLVED.

This case involves the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, 49 U. S. C. 1 *et seq.*, as amended. The pertinent provisions thereof, as they were in effect at the time of the transactions under consideration, are as follows:

> "Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful" (41 Stat. 479).
>
> "Section 3 (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any

undue or unreasonable prejudice or disadvantage in any respect whatsoever" (24 Stat. 380).

"Section 6 (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs" (34 Stat. 587).

"Section 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be taxed and collected as part of the costs in the case" (24 Stat. 382).

"Section 16. * * *

"(3) (a) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof,

shall be begun within three years from the time the cause of action accrues, and not after" (43 Stat. 633).

"(b) All complaints against carriers subject to this Act for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d)" (43 Stat. 633).

"(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this Act within three years from the time the cause of action accrues, and years after, subject to subdivision (d); except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice" (43 Stat. 633).

QUESTION PRESENTED.

In a suit by a carrier against a shipper to collect the full amount of unpaid freight charges lawfully due, does the Interstate Commerce Act require that a written agreement *by the shipper* not to plead the limitation provision contained in Section 16 (3) (a) of the Act must be held invalid, where the agreement was made before the expiration of the limitation period, as part of an understanding whereby the carrier agreed to forego suit for a short specified period in order to enable the shipper to further investigate the claim, and where the carrier, in reliance on the shipper's agreement, did actually refrain from bringing suit for the specified time, the statutory period having expired in the meanwhile?

STATEMENT OF THE CASE.

During the months of October and November, 1932, petitioner shipped twenty-one carloads of grapes over the respondent's railroad lines (R. 1-2 *et seq.*).* The grapes were shipped by petitioner as consignor to itself as consignee (R. 1-2 *et seq.*). In accordance with petitioner's diversion orders the grapes were delivered by respondent to Jerome Distributing Company as petitioner's agent, at Manhattan Produce Yards, N. J., between October 28 and November 21, 1932 (R-2, 4 *et seq.* and 51-52 *et seq.*).

Respondent's transportation charges on these shipments, in accordance with tariffs on file with the Interstate Commerce Commission, amounted to $13,678.86 (R. 38). These charges have never been received by respondent (R. 94 *et seq.*). Together with interest, they constitute the amount of the judgment in this case (R. 86).

Respondent and its connecting carriers transported the grapes and delivered them to Jerome Distributing Company, petitioner's agent, from which latter concern respondent received three checks for the full amount of the freight charges (R. 100-105). In accordance with its general custom respondent delivered receipted freight bills to Jerome in exchange for these checks (R. 105, 124). Thereafter the checks issued by Jerome and delivered to respondent were dishonored by the bank upon which they were drawn (R. 100-104, 126-128).

Respondent subsequently made repeated attempts to collect the freight charges. It sued Jerome and obtained a judgment, which it was unable to satisfy because Jerome had become insolvent. Respondent also attempted to collect from petitioner (R. 3 *et seq.*; 94 *et seq.*; 121, 122).

---

*This case involves twenty-one shipments, each of which was treated as a separate cause of action. The circumstances in connection with each shipment are practically identical. Therefore, where the record sets forth circumstances concerning a certain shipment which likewise obtain with respect to the others, reference to the pages of the record where they first appear only are shown and are followed by the words "*et seq.*"

All such attempts were unsuccessful and the transportation charges are still unpaid (R. 3 *et seq.* and 94 *et seq.*).

Section 16 (3) (a) of the Interstate Commerce Act, as it was then in effect, provided as follows (43 Stat. 633):

> "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

The three-year period of limitation thus provided by the statute expired on October 28, 1935, with respect to the earliest shipment (R. 4). Prior to that time respondent proposed and threatened to bring suit against petitioner for the collection of the transportation charges (R. 40). Petitioner requested respondent to give it additional time for the purpose of investigating the claim and to withhold the filing of the action until January 1, 1936 (R. 40). To secure such an extension of time, petitioner executed a written agreement with respondent providing as follows (R. 39-41):

> "The Mid State Horticultural Company, Inc., a Corporation of the State of California, hereby agrees that:
>
> "Whereas, The Pennsylvania Railroad Company is urging against the said Mid State Horticultural Company, Inc. a claim for the proper and lawful transportation charges, aggregating (subject to correction) $13,678.86, on twenty-one shipments of grapes made by the said Mid State Horticultural Company, Inc. from points in California during the month of October, 1932, which were moved to New York City or vicinity, and there delivered to the Jerome Distributing Company, Inc. during the month of November, 1932, which shipments, identified by car number, and the amount due on each thereof, are as follows:

PFE	36495	$687.73	PFE	71402	$682.63
PFE	24375	683.83	PFE	35599	638.33
PFE	1478	660.43	PFE	28824	667.33
PFE	71971	589.38	PFE	71097	583.38
PFE	36105	689.73	PFE	14118	579.03
PFE	14745	662.83	PFE	16444	671.53
PFE	13607	670.33	PFE	32461	682.43
PFE	15847	658.13	PFE	16386	619.63
SFRD	17404	695.51	SFRD	18007	621.58
SFRD	22471	698.33	PFE	13520	617.58
					$13,678.86

"And whereas The Pennsylvania Railroad Company proposes to bring suit against the said Mid State Horticultural Company, Inc. looking toward the recovery and collection of such charges on October 28, 1935.

"And whereas the said Mid State Horticultural Company, Inc. desires additional time for investigation and consideration of said claim, and thus requests The Pennsylvania Railroad Company to withhold the institution of any such action until January 1, 1936.

"And whereas The Pennsylvania Railroad Company is willing, in the hope that the said Mid State Horticultural Company may conclude to pay said claim without the necessity of litigation, to defer the institution of suit thereon until January 1, 1936, or until such earlier date as the said Mid State Horticultural Company may definitely refuse to pay said claim, the understanding being that The Pennsylvania Railroad Company may then institute such a suit within a reasonable time, not exceeding one month, after January 1, 1936, or after the date of such refusal to pay.

"Now, therefore, in consideration of the forebearance of The Pennsylvania Railroad Company to bring such a suit against the Mid State Horticultural Com-

pany, Inc. prior to October 28, 1935, the said Mid State Horticultural Company, Inc. hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an action, it, the said Mid State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.

"This agreement is not an admission of the alleged debt by the Mid State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid State Horticultural Company, Inc. may have to said claim.

"Dated at Philadelphia, Pa. this 25th day of October, 1935.

"MID STATE HORTICULTURAL COMPANY, INC.

By

(S) A. SETRAKIAN
Vice-President."

On December 26, 1935, petitioner definitely refused to pay any part of the charges (R. 3 *et seq.* and 53 *et seq.*). This action was commenced on December 31, 1935, within the period specified in the above quoted agreement and less than two months after the running of the statute of limitations hereinabove referred to (R. 197). Thereupon petitioner, in spite of its express agreement to the contrary, pleaded the statute of limitations (R. 52 *et seq.*).

Petitioner was directly liable for the freight charges under the bills of lading, as owner of the goods and as actual consignee. The bills of lading provide in Section 7 thereof (R. 38B):

"The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; * * *"

Jerome Distributing Company, to which the shipments were delivered, was not the ultimate consignee, but was merely petitioner's receiving agent (R. 2 *et seq.*). In the pleadings it was admitted that petitioner was the actual consignee (R. 52 *et seq.*).

The delivery by respondent was made to Jerome, as petitioner's agent, under petitioner's written diversion orders (R. 2 *et seq.* and 51-52 *et seq.*).

Nowhere in its briefs or petitions has petitioner contended that either the delivery to Jerome or the acceptance of checks from Jerome by respondent constitutes an affirmative defense to this action against petitioner under the bills of lading.

Petitioner raises the defense of the statute of limitations, in open repudiation of its agreement not to do so. It makes no defense to its liability on the merits. Petitioner did advance in the courts below a subsidiary defense of alleged estoppel, based on the fact that respondent's agent gave petitioner's agent, Jerome, receipted freight bills in exchange for Jerome's checks. Petitioner apparently abandoned this defense below, and does not argue it at all in its brief in this court, although the facts on which it is based are mentioned at the end of its "Statement of the Case." This point will be discussed briefly in the latter part of respondent's brief herein.

Thus, respondent in this case has performed transportation services for petitioner, under the contract between the two parties as embodied in the bills of lading, for which services respondent has not been paid. Respondent, having been unable to collect the charges for its services from petitioner's agent, Jerome, endeavored to collect those charges from petitioner, as consignee and actual owner of the shipments, and, shortly prior to the expiration of the statutory period of limitations, threatened to bring suit against petitioner for that purpose. Petitioner thereupon requested respondent to refrain from bringing suit, in order to permit petitioner to make a further in-

vestigation of the facts. For the purpose of thus inducing respondent to refrain from bringing suit, petitioner promised not to plead the statute of limitations, and accordingly respondent, relying on such promise, agreed not to bring suit for a stated period, amounting to approximately two months. This agreement was reduced to writing, and in that written agreement petitioner and respondent also agreed as to the specific amounts which were due to respondent for its services in transporting the shipments in question. After the statutory period had expired, but before the expiration of the two-months period provided in the agreement, petitioner definitely stated its intention not to pay the charges, whereupon this suit was brought.

ARGUMENT.

There can be no question on the merits as to petitioner's liability for the charges. It was not only the consignor but also the actual consignee and owner of the goods, Jerome being but its agent. The bills of lading, which petitioner duly executed, provided that "the owner or consignee shall pay" the charges. Its liability under such provisions in the contract of carriage is clear: *Pittsburgh C. C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 40 S. Ct. 27 (1919); *N. Y. Cent. R. R.* v. *York & Whitney Co.*, 256 U. S. 406, 41 S. Ct. 509 (1921).

Petitioner's defense is the statute of limitations. It claims that its agreement not to raise that defense must be declared invalid and disregarded as being designed to promote discriminations and preferences contrary to the provisions and policy of the Interstate Commerce Act. In support of this position petitioner cites many cases, in some of which actual unjust discriminations and undue preferences contrary to the express prohibitions of the Interstate Commerce Act were involved, and in others of which it was held that a waiver by a *carrier* of the statute

of limitations or other defense available to it should be held invalid as likely to promote unjust discriminations and undue preferences by carriers among shippers. No reported decision cited by petitioner or known to respondent has held that an agreement on the part of a *shipper* not to plead the statute of limitations, such as that involved in the present case, is invalid; on the contrary, the only reported case on the question holds that such a waiver is valid. It will be shown below that there is nothing in the agreement involved in the present case, whereby petitioner promised not to plead the statute of limitations, which constitutes an unjust discrimination or an undue preference in violation of the prohibitions of the Interstate Commerce Act, or which would constitute a precedent making possible unjust discriminations or undue preferences in other cases, and that there is nothing either in the language or in the policy of the Act to prevent petitioner from being held to its promise, in accordance with basic and long established principles of the common law.

I. It is a Basic Principle of the Common Law that the Statute of Limitations May Not be Pleaded Against a Creditor Who Has Refrained From Bringing Suit Within the Statutory Period in Reliance on the Debtor's Promise Not to Plead the Statute.

Reduced to its basic elements, this is a case where a debtor, being threatened with suit by his creditor, as the statutory period of limitation nears its end, proceeds, by begging additional time for the purpose of further investigating the facts and promising not to plead the statute of limitations as a defense, to induce the creditor to refrain from bringing suit until after the statutory period has expired, and then repudiates his promise and relies solely on the statute of limitations in resisting the creditor's suit. In those simple terms, the case is one which

would admit of no doubt, under well-established and elementary principles of law. Practically all the cases and authorities are agreed that, where one owing a matured debt promises his creditor not to plead the statute of limitations as a defense to the debt, the purpose of the promise being to induce the creditor to refrain from bringing suit prior to the expiration of the statutory period, and where the creditor in reliance on that promise does refrain from suing prior to the expiration of the statutory period, the debtor will not be permitted to plead the statute of limitations in a suit brought promptly thereafter by the creditor. The grounds for this elementary rule are variously stated in the cases in terms of waiver or estoppel or implied new promise to pay the debt. But the result is clear and undisputed—the basic reason apparently being that any other result would permit the debtor to perpetrate an unconscionable fraud upon his creditor for the purpose of escaping payment of his just debt. The many authorities to this effect are collected and reviewed in Wood on Limitations (4th Ed., 1916), Sec. 76, Williston on Contracts (Rev. Ed., 1936), Secs. 183, 184, 689, and in numerous other treatises and discussions, and principles to the same effect are adopted by the Restatement of Contracts, Sec. 86 (2) (c), Comment, and Sec. 90. As stated in Wood, *supra*, Sec. 76:

> "While a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay it, yet, *if made before the debt is barred, and in consideration of forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor*, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires, either by way of estoppel, or as a conditional promise to pay the debt in case the plaintiff proves it. *An agreement not to plead the statute of limitations,*

if upon good consideration, is valid, and forbearance to sue is such good consideration." (Emphasis supplied.)

A few cases may be cited as examples. Thus, in *Randon v. Toby*, 11 How. 493 (1850), this Court, speaking through Mr. Justice Grier, said, with respect to a written agreement by a debtor not to plead the statute of limitations (p. 519):

"This agreement, being founded on a good consideration and accepted by the plaintiff, became incorporated in the notes, and formed a part of the contract, by mutual consent. It extended the time of payment, and the statute did not begin to run till the extended time had expired. It operated also by way of estoppel *in pais* to a defence under the statute of limitations. *Otherwise the defendant would gain an advantage by his own fraud*, or put the plaintiff to an action on the agreement. On one or the other of these principles, the doctrine of estoppel has its foundation. The plea of the statute is a breach of the agreement, and, to avoid circuity of action, it may be set up in avoidance of the plea." (Emphasis supplied.)

In *Gaylord v. VanLoan*, 15 Wend. (N. Y.) 308 (1836), the New York court, in rejecting a debtor's plea of the statute of limitations on the ground that it was contrary to his agreement not to plead the statute, said (pp. 310, 313-14):

"The agreement not to plead the statute, as respects this note, operated as a fraud upon the plaintiff. Had it not been made, he could have prevented the effect of the statute by commencing his suit. By pleading the statute, the defendant is guilty of bad faith, and, upon general principles, should be estopped from availing himself of that defence. No one ought

to be permitted to disregard his own deliberate, lawful agreement, to the injury of another. • • • *Not only in conscience, but in law, the defendant cannot be allowed to set up his own breach of faith, or fraud, in order to derive an advantage for himself, to the injury of the person deceived by him. It would be giving him the fruits of his iniquity, and bidding a bounty upon treachery and fraud.*" (Emphasis supplied.)

In *Webber* v. *Williams College*, 23 Pick. (Mass.) 302 (1840), Mr. Chief Justice Shaw, for the Supreme Judicial Court of Massachusetts, held the defendant barred from pleading the statute of limitations because it had offered the plaintiff an extension of time beyond the statutory period if the plaintiff would forbear bringing suit, which the plaintiff did. To like effect are the decisions in *Bewley* v. *Power*, Hayes & Jones Exchequer Reports 368 (1833); *Lade* v. *Trill*, 6 Jur. 272 (1842); *Warren* v. *Walker*, 23 Me. 453 (1844). An example of a modern application of the principle is contained in *Howard* v. *West Jersey & S. S. R. Co.*, 102 N. J. E. 517, 141 A. 755 (1928), aff'd 104 N. J. E. 201, 144 A. 919 (1929), where the principle was summarized as follows (p. 757 of 141 A.):

"It must be recognized that the statute of limitations is for the benefit of individuals, and not to secure general objects of policy; hence it may be waived by express contract or by necessary implication, or its benefits may be lost by conduct invoking the established principles of estoppel *in pais*."

Thus it is clear that, as a general and well-established principle of law, a debtor will not be permitted to plead the statute of limitations against a creditor who has refrained from bringing suit in reliance on the debtor's promise not to plead the statute, made after the debt had matured but before the statutory period had expired, and

who thereafter brings suit promptly upon learning of the debtor's inability or refusal to pay.*

When such a situation exists, as it does in the present case, what circumstances can there be to prevent the application of the rule which the courts have uniformly applied and which simple justice requires? What reason can petitioner give, in the face of the basic principle, which petitioner does not deny, to justify its attempt to escape liability for payment of the just debt which it owes and as to which it presents no defense on the merits?

There are two lines of argument which petitioner adopts in its endeavor to prevent application to this case of the fundamental rule stated above. The first is that the Interstate Commerce Act, in Section 16 (3) (a) of which the limitation here in question is contained, shows on its face that that limitation was intended to operate so as to destroy completely a carrier's right to recover its charges after the expiration of the limitation period, irrespective of any waiver or agreement between the parties. The second line of argument adopted by peti-

* The situation here under consideration, *i. e.*, where a debtor induces his creditor to forbear bringing suit prior to the expiration of the statutory period, by making, after the debt has matured but before the statute has expired, a written promise not to plead the statute of limitations, and where the creditor thereafter promptly brings suit upon learning of the debtor's inability or unwillingness to pay his debt, is to be distinguished from other types of situations with respect to which the courts have differed, as, for example, where the debtor promised, as part of his original obligation, *never* to plead the statute of limitations, which some courts have held to be contrary to the policy of the statute, or where the debtor's promise not to plead the statute was made after the statutory period had expired and without sufficient consideration, or where the promise was oral and a question was raised under the statute of frauds. There has also been some discussion in the authorities as to whether a valid waiver of the statute of limitations is to be held good for an indefinite period of time or for the statutory period, running from the time of the waiver, or for a reasonable period. See discussion in Wood on Limitations, *supra*, Sec. 76, Williston on Contracts, *supra*, Sec. 183, and note in 30 Columbia Law Review, 383. The cases are practically unanimous, however, that where there is an agreement like that in the case at bar, and similar attending circumstances, the debtor will not be permitted to plead the statute in repudiation of his agreement.

tioner is that the policy of the Interstate Commerce Act, viz., to prevent unjust discriminations and undue preferences and prejudices among shippers, requires that a waiver of the statute of limitations by a shipper, such as that contained in this case, should be held invalid and the carrier should be barred altogether from collecting its charges after the expiration of the statutory period, regardless of any agreement to the contrary between the carrier and the shipper. Respondent submits that neither of these lines of argument is adequate to prevent application to this case of the basic and elementary rule, that a debtor will not be permitted to escape his just debt by causing his creditor to forego suit within the statutory period, upon the debtor's promise not to plead the statute of limitations, and then repudiating that promise.

II. There Is Nothing, Either on the Face of or in the History of the Provision of the Interstate Commerce Act Limiting the Time Within Which Suits by Carriers to Recover Their Charges May Be Brought, Which Indicates that a Valid Waiver of Such Limitation for a Reasonable Period of Time May Not Be Agreed upon Between the Carrier and the Shipper.

At the outset it is important to point out, contrary to petitioner's contention, that this case does not fall within the line of cases holding that the fact that a cause of action wholly created by statute is subject to a limitation period imposed by the same statute is presumed to indicate a legislative purpose that the limitation shall be regarded as a condition of the cause of action itself, which is therefore destroyed upon the expiration of the statutory limitation period, with the result that the limitation period cannot be extended or waived by agreement of the parties. Among numerous cases in which that principle has been stated, the following may be cited as illustrations: *The Harrisburg*, 119 U. S. 199, 7 S. Ct. 140 (1886):

U. S. ex. rel. Texas Portland Cement Co. v. *McCord*, 233 U. S. 157, 34 S. Ct. 550 (1914); *Partee* v. *St. Louis & S. F. R. Co.*, 204 Fed. 970 (C. C. A. 8th, 1913); *McNutt* v. *Bakewell*, 223 Pa. 364 (1909). The reason for the principle is plain. Where the legislature has in the same statute created a wholly new cause of action unknown to the common law, and has provided a remedy by which that cause of action may be asserted, but has limited the period for doing so, it may ordinarily be assumed that the legislature intended the limitation to be an indispensable condition of the cause of action, which should not under any circumstances be asserted after the expiration of the statutory period.* That assumption is of course not made where it appears that the legislature had no such intent but on the contrary intended the limitation to be, like other statutes of limitation, merely a statute of repose, for the protection of the defendant: *Hill* v. *Hesse*, 126 Cal. A. 171, 15 P. (2d) 526 (1932). In such a case the limitation is said not to destroy the right but merely to bar the remedy, and it is therefore, like other statutes of limitation, capable of being "waived," in appropriate circumstances.

But in any event, this principle is limited to cases where the cause of action to which the limitation applies is created by the same statute, and it therefore has no application in a case where the cause of action is not created by that statute or by any statute but is founded on common law rights. The latter situation exists in the present case. A carrier's right to recover from the shipper the freight charges due the carrier for its transportation sevices is founded not upon the Interstate Commerce Act but upon the contract of carriage between the parties and their common-law rights and obligations thereunder. In this respect the present situation is to be sharply distinguished from a case in which the suit is *by the shipper*

* Common examples are the wrongful death statutes, the workmen's compensation acts, acts which give consent to sue the government, such as the Court of Claims Act, etc.

against the carrier alleging that the charges claimed by the carrier are unreasonable or not in accord with the carrier's published tariffs, since in the latter type of case the shipper's claim is created by and arises out of the Interstate Commerce Act.

A. A Carrier's Cause of Action for the Recovery of Freight Charges Due It for Its Transportation Services Is Based Not Upon the Interstate Commerce Act but Upon the Contract of Carriage and the Carrier's Common-Law Rights Thereunder.

That a cause of action to recover freight charges due to a carrier for transportation services performed by it (as distinguished from actions by shippers against carriers claiming the carriers' charges to be unreasonable or not in accord with their published tariffs) is not derived from or based upon the Interstate Commerce Act, is evident from an examination of the Act itself.

One of the principal purposes of the Interstate Commerce Act was to guard against unjust discriminations and undue preferences among shippers. For the accomplishment of this purpose, the Act requires carriers to publish tariffs stating the amounts of their charges and the terms on which their services are offered, and it forbids the carriers to depart from the provisions of those tariffs (Section 6). In accordance with this purpose, it not only makes it unlawful for a carrier to depart from the provisions of its tariffs but it gives the shipper a cause of action to recover any amount charged by the carrier in excess of the amount fixed by its published tariffs (Section 8). The Act likewise prohibits carriers from charging more than reasonable rates, and gives the shipper a cause of action for recovery of amounts in excess of reasonable rates as determined in proceedings before the Interstate Commerce Commission (Sections 1 and 8). Thus, the question as to what is a proper *amount* for the carrier to charge for its transportation services is very

fully and completely regulated by the Interstate Commerce Act and the administrative machinery set up thereunder, and the Act creates and is itself the source of liability on the part of the carrier to the shipper with respect to amounts charged by the carrier in excess of the amount thus fixed under the terms of the Act as the proper amount.

Nowhere in the Act, however, is there a provision which creates for the carrier a cause of action or right of recovery for the charges lawfully due it for its transportation services, or which specifies how those charges shall be collected. There is not a word in the Act on that subject,* and the carrier's right to recover its lawful charges and its remedies to enforce that right are obviously based not upon the Act but upon the contract of carriage between the carrier and the shipper and the respective common-law rights and obligations of the parties thereunder. Where, as is the case here, the carrier is confronted with the necessity of proceeding to collect the charges due it for its transportation services, and where, as here, the charges are undisputed in amount† and there is no question as to their reasonableness or their being in accord with the published tariff rates, the carrier is left by the Act entirely to its common-law rights and remedies, based on its contract of carriage with the shipper.

The fact that a carrier's cause of action to recover the

*The fact that the carrier's basic right to recover its lawful charges is founded not upon the Interstate Commerce Act but upon the contract of carriage is not altered by the provisions of Sec. 3 (2) of the Act, providing for liability or nonliability in certain special types of cases, as, for example, where a consignee is merely agent and not the beneficial owner, and it is accordingly provided that he shall not be liable for additional after-discovered charges. None of the special situations there specified is involved in the present case, and there can be no question that the liability of petitioner herein for the charges in question is based not upon the Interstate Commerce Act but upon petitioner's contract of carriage.

†The amounts of the charges due to respondent were stated in the agreement of waiver between petitioner and respondent (R. 40), and are admitted by petitioner's pleadings (R. 2 *et seq.* and 51 *et seq.*), so that there is no question as to the propriety of the amounts of those charges.

charges which are due it for its transportation services is founded not on the Interstate Commerce Act but on the contract of carriage between the carrier and shipper is clearly established by the cases. Thus, in *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441 (1924), the carrier brought suit against the apparent consignor of a shipment, to collect certain charges due it under the legally applicable tariff rate. The question was whether or not the defendant, who was not the actual owner of the shipment at the time of its delivery to the carrier, was the proper party to pay the charges in question, and in determining that question the Supreme Court held that it must look to the contract of carriage. Speaking through Mr. Justice Brandeis, this Court said (pp. 65-67 of 265 U. S.):

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The *amount* of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus they were fixed by law. *No contract of the carrier could reduce the amount legally payable*, or release from liability a shipper *who had assumed an obligation to pay the charges*. * * * But delivery of goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation to pay the freight charges. *The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract*, subject to the rule which prohibits discrimination. * * * Nor does delivery of goods to a carrier necessarily import, under the general law, an absolute promise by the shipper to pay the freight charges. We must, therefore, determine *what promise, if any, to pay freight charges was, in fact, made by the Central Company.*" (Emphasis supplied.)

Thus, this Court said in that case, in the plainest possible language, that the question as to who is liable to pay the charges lawfully due a carrier for its transportation services is one which is determined not by any of the provisions of the Interstate Commerce Act but by the contract of carriage between the parties. It follows that the carrier's cause of action to recover such charges is based not upon the Act but upon the obligation of the shipper expressed in the contract.

The point has been particularly well stated in a recent decision of the Supreme Court of Illinois, *Alton R. Co.* v. *Gillarde*, 379 Ill. 308, 40 N. E. (2d) 727 (1942). In holding in that case that the carrier was entitled to recover its charges from the party who was in effect both consignor and consignee, under the terms of the bill of lading, the court said (pp. 313-14 of 379 Ill.):

> "It has been repeatedly held that while the rights and liabilities of shippers as to the *rates and amounts* of the charges made are governed by the Federal laws relating to interstate commerce, as interpreted by the Federal courts, *still the Interstate Commerce Act does not purport to determine upon whom the liability to pay transportation charges shall fall. This is a matter of contract in no way controlled by the Interstate Commerce Act.* In *Houston & T. C. Ry. Co.* v. *Lee County Produce Co.*, D. C., 14 F. 2d 145, 157, it was said, 'It cannot be reasonably contended that laws and regulations designed to prevent discrimination between shippers have developed a new series of contractual rights, or disturbed old concepts of wrong; these laws merely prevent railroads carrying freight for one on better terms than for another.' Many other cases might be cited to the same effect. *The Interstate Commerce Act is not concerned with who shall pay the transportation charges.* It permits the carrier to make any contract it may see fit with reference to who shall pay the charges. Its only purpose

is to prevent discrimination and rebates. It prohibits the application of any act or conduct as estopping a carrier from exacting the lawful freight rate. Its purposes are obvious. It has no application to the facts in this case." (Emphasis supplied.)

To like effect is the decision of the Supreme Judicial Court of Massachusets in *Pennsylvania R. Co.* v. *Lord and Spencer*, 295 Mass. 179, 3 N. E. (2d) 231 (1936). In that case the carrier sued to collect its freight charges, as to the amount of which there was no dispute, the only question being whether or not the defendant was the proper party to pay the charges. Speaking through Mr. Chief Justice Rugg, the Massachusetts court said (pp. 181-82 of 295 Mass.):

> "This is an action to recover charges for transportation in interstate commerce. Therefore the issues of law must be decided according to statutes of the United States so far as applicable. *Where not governed by such statutes, the rights of the parties depend upon the principles of the common law. The Federal statutes impose no obligation upon a particular party to pay charges for transportation. 'As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination.' Louisville & Nashville Railroad Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 442, 68 L. Ed. 900; *American Railway Express Co.* v. *Mohawk Dairy Co.*, 250 Mass. 1, 6, 144 N. E. 721, 35 A. L. R. 14. See 44 U. S. Stat. 1447." (Emphasis supplied.)

Similarly, in *Pennsylvania R. Co.* v. *Fox & London, Inc.*, 93 F. (2d) 669 (C. C. A. 2d, 1938) (cert. den., 304 U. S. 566; 58 S. Ct. 949), it was said that "the Interstate Commerce Commission only has such jurisdiction as has been conferred upon it by Congress, and that does not give

it power to make orders adjudicating claims of carriers against shippers and requiring payment of such claims."

See also *Oregon-Washington R. & Nav. Co.* v. *Seattle Grain Co.*, 106 Wash. 1, 178 P. 648 (1919);* *St. Louis Southwestern Ry. Co.* v. *Gramling*, 97 Ark. 353, 133 S. W. 1129 (1911); *Reading Co.* v. *Sobelman*, 144 Pa. Super. Ct. 270, 19 A. (2d) 754 (1941).

Of course the situation here presented, in which the carrier is suing to recover the full amount of the undisputed charges, is to be distinguished from cases like *Button* v. *Atchison, T. & S. F. Ry. Co.*, 1 F. (2d) 709 (C. C. A. 8th, 1924);† and *Wisconsin Bridge and Iron Co.* v. *Illinois Terminal Co.*, 88 F. (2d) 459 (C. C. A. 7th, 1937),† cited by petitioner, which involve suits by carriers, brought after the originally billed charges have been paid, to recover *additional* amounts alleged to be due under the applicable tariffs, where the right of the carrier to recover such additional amounts flows directly from specific provisions of the Interstate Commerce Act. To the extent that the Texas district court in *Galveston H. & S. A. R. Co.* v. *Webster Co.*, 27 F. (2d) 765 (W. D. Tex., 1928),† used loose language, not necessary to its decision, to the effect that a carrier's cause of action to recover its full undisputed charges is created by the Interstate Commerce Act, that court was clearly wrong, for the reasons already stated.

Thus, it is clear both from the face of the Interstate Commerce Act itself and from the cases that the cause of action on which the present suit is founded was not created

* In that case the court said (p. 650 of 178 P.):

"A liability created by statute is one in which no element of agreement enters. It is an obligation which the law creates in the absence of an agreement. But the present liability is not of this sort. The law but fixes the rate to be charged when a contract of carriage is made. In other words, the law does not create the liability; it but determines the amount of the liability created by the express contract of the parties. *As such it is not a liability created by statute. It is a liability arising out of the contract which the parties have by their writing expressed.*" (Emphasis supplied.)

† These cases are more fully discussed below, at pp. 64-68.

by the Interstate Commerce Act or by any other statute but is based upon the carrier's common-law rights growing out of the contract of carriage, *i. e.*, upon the shipper's express promise, as contained in the bill of lading, to pay the charges. Therefore the case does not fall within the line of cases holding that the fact that a cause of action created by statute is subject to a limitation period imposed in the same statute indicates a legislative intent that the cause of action shall be destroyed upon the expiration of the limitation period.

In this respect the case is to be sharply distinguished from the decisions of this Court upon which petitioner chiefly relies and which will be more fully discussed below (pp. 53 *et seq.*), viz., the decisions in *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, 35 S. Ct. 444 (1915), and cases following it, such as *Kansas City Southern R. Co. v. Wolf*, 261 U. S. 133, 43 S. Ct. 259 (1923). In the *Phillips* case the suit was by a shipper against the carrier to recover damages for the charging of unreasonable rates, and was based on a finding by the Interstate Commerce Commission that the rates in question were unreasonable. There could be no doubt that the shipper's cause of action in that case was one which was created by and founded upon the Interstate Commerce Act. In the *Kansas City Southern* case, the suit was again by a shipper against the carrier, alleging that the charges collected by the carrier were in excess of the amount lawfully determined in accordance with the published tariff rates. Again the cause of action was one which was based upon the Interstate Commerce Act, since it turned on a question as to the amount of charges due under the tariffs which the Act required the carrier to publish and from which it prohibited any departure (see above, pp. 19-22). Those cases and others like them therefore do not advance the petitioner's contention that the carrier's cause of action in the present case is created by the Interstate Commerce Act. Furthermore,

the decision of this Court in those cases, to the effect that the statutory cause of action was destroyed upon the expiration of the limitation period, was rested not upon the fact that the cause of action and the limitation were contained in the same statute but upon reasons of policy which, as will be shown below (pp. 37-50), have no application to the present case.

B. THERE IS NOTHING IN THE LANGUAGE OF THE PROVISION LIMITING SUITS BY CARRIERS TO RECOVER THEIR CHARGES, WHICH INDICATES THAT A PROMISE NOT TO PLEAD IT SHALL NOT BE VALID AND BINDING.

The limitation period upon which petitioner relies in this case is contained in Section 16 (3) (a) of the Interstate Commerce Act, which, at the time the shipments here in question moved, provided as follows (43 Stat. 633):

> "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

Petitioner contends that the phrase "and not after" in this provision manifests a Congressional purpose to destroy completely, after the expiration of the three-year period, the carrier's common-law right to recover the charges lawfully due it for its transportation services, and to make impossible any waiver of the limitation. In this respect petitioner seeks support from language used in the opinion of this Court in *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 35 S. Ct. 444 (1915). As already pointed out above (p. 24), the decision in that case, which involved a suit by a shipper based on a finding of the Interstate Commerce Commission that the carrier's rate was unreasonably high, can have no application to the present case, because the cause of action there involved was one which was created by the Interstate Commerce Act, while the cause of action in the present case is founded upon the carrier's common-law rights under its

contract of carriage, and also because the ground of the decision in the *Phillips* case consisted primarily of reasons of policy which have no application to the present case. Moreover, there was no question in that case as to any "waiver" of the statutory limitation or promise not to plead it, and the case therefore decided nothing with regard to the validity of such a waiver or promise.

The shipper's suit in the *Phillips* case was brought after the expiration of the two-year limitation period provided in the Interstate Commerce Act for suits of that character, and this Court, in holding quite properly that the suit was barred by the limitation, addressed itself to an argument that the local state practice which governed the case did not permit the defense of the statute of limitations to be raised under a general demurrer. This argument the Court rejected on the ground that the cause of action on which the shipper sued was one which was completely destroyed upon the expiration of the limitation period. In taking that position, the Court, speaking through Mr. Justice Lamar, made the following remark (p. 667 of 236 U. S.):

> "But that rule [*i. e.*, the rule that the defense of the statute may not be raised by a general demurrer] does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *U. S.*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction."

It is apparent from reading the opinion as a whole that this remark as to the significance of the words "and not after" was purely *obiter dictum*, because the opinion goes on to rest its conclusion in this respect primarily on the point that discrimination would be made possible, con-

trary to the policy of the Act, if it were not held that the shipper's cause of action was completely destroyed upon the expiration of the limitation period.* Furthermore, Mr. Justice Lamar's remark, regarding the significance of the phrase "and not after," was apparently made in disregard or in unawareness of the history of that phrase.

Before considering the history and significance of the phrase "and not after," it is important to distinguish the case cited by Mr. Justice Lamar in this connection in the passage quoted above, viz., *Finn* v. *U. S.*, 123 U. S. 227, 8 S. Ct. 82 (1887). That was a suit against the United States, originating in the Court of Claims, for the value of property sold to the United States. The suit was brought after the expiration of the six-year period of limitation provided in the Court of Claims Act, and the Supreme Court held, quite properly, that the general rule permitting waiver of the statute of limitations had no application to suits in the Court of Claims against the United States, since the Government had not conferred authority upon any of its officers to waive the limitation provision, and since the Government could not in any event be sued without its consent, and its consent, as given in the Court of Claims Act, was expressly conditioned upon the bringing of the suit within the six-year period specified in the Act. Plainly, that case has no relevance or application to the situation presented in the case at bar.

To return to the phrase "and not after," it is clear from an examination of statutes of limitations generally and the decisions applying them that, contrary to petitioner's contention and to Mr. Justice Lamar's statement in the *Phillips* case, the phrase has no significance on the issue here presented, viz., whether or not the limitation provision can be waived, and does not distinguish the limitation provisions contained in the Interstate Commerce Act from general statutes of limitation. Investigation shows that the phrase is as old as statutes of limitations

* This point is more fully discussed below, at pp. 37-50.

themselves. It appeared not less than five times in the earliest English general statute of limitations,* which was the statute of 21 James I. c. 16 (1623), known as "The Limitation Act.† But the use of that phrase in the gen-

* The phrase "and not after" appeared in an even earlier statute of limitations, that of 31 Eliz. c. 5, enacted in 1589, which was primarily a limitation on penal actions, and which provided that such actions should be brought "within two years next after the offence committed or to be committed against such act penal, *and not after* two years." (Emphasis supplied.) (7 Chitty's English Statutes, 6th Ed., pp. 618-19.) Other early statutes of limitations, such as the statute of Merton, 20 Hen. III. c. 8 (1235), and the statute of 32 Hen. VIII. c. 2 (1540), were confined to limitations upon actions involving real property (see Coke's Second Institutes 94-96). The latter statute contained the following language (see Angell on Limitations, 6th Ed., Appendix, p. 504):

> "All formedons in reverter, formedons in remainder, and *Scire facias*, upon fines of any Mannors, Lands, Tenements, or other Hereditaments shall bee sued and taken within fiftie years next after the title and cause of action fallend, *and at no time after* the said fiftie yeares passed." (Emphasis supplied.)

† "All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur* trover and replevin for taking away of goods and cattle, all actions of account, and upon the case (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants) all actions of debt, grounded upon any lending or contract without specialty, all actions of debt for arrearages of rents, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, *and not after* (that is to say), the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit* within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, *and not after;* and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, *and not after;* and the said actions upon the case for words within one year after the end of this present session of parliament, or within two years next after the words spoken, *and not after.*

"And nevertheless be it enacted, that if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff or outlawry reversed, *and not after.*" (Emphasis supplied.) (7 Chitty's English Statutes, 6th Ed., pp. 619-25.)

eral statute of limitations did not prevent the English courts from establishing, as a basic principle of the common law, that general statutes of limitations do not operate to destroy the liability but on the contrary constitute merely a personal defense which may be waived either by failure properly to plead it or by a binding promise not to plead it. The question whether or not the limitation enacted by such a statute could be validly waived by a debtor's promise not to plead it was squarely raised in a case in the Court of Exchequer in Ireland in 1833. A limitation act embodying the same provisions, in almost identical language, and including the phrase "and not after" in the same contexts as in the statute of 21 James I, was enacted for Ireland in 10 Charles I. c. 6 (1634), and thereafter remained in substance the general statute of limitations for Ireland (2 Irish Statutes, pp. 54-55; see the recital clause in the Statute of Frauds Amendment Act, 9 Geo. IV. c. 14 (1828), known as "Lord Tenterden's Act," 7 Chitty's English Statutes, 6th Ed., pp. 629-32). In *Bewley* v. *Power*, Hayes & Jones Exchequer Reports 368 (1833), the plaintiff had refrained from bringing suit prior to the expiration of the six-year statutory period, and in so refraining had relied on a letter from the defendant in which the latter stated he would not plead the statute of limitations. Suit having been brought after the expiration of the statutory period, the Irish Court of Exchequer held that the defendant was bound by his letter and that the plaintiff should have judgment for the amount of the note. It was not even contended that the phrase "and not after," which qualified the limitation period applicable to the plaintiff's claim under the statute, operated to destroy the plaintiff's cause of action at the expiration of the statutory period or to prevent the debtor from being bound by his promise not to plead it.

The same phrase appears in many state statutes of limitations, and numerous cases have nevertheless held waivers of the limitation under such statutes valid. Thus,

in *Quick* v. *Corlies*, 39 N. J. L. 11 (1876), the New Jersey court pointed out that "this obligation being under seal, the action upon it must be commenced within sixteen years next after the cause of action shall have accrued, *and not after*, by the statutes of limitation of our state." (Emphasis supplied.) And yet the court went on to say, with regard to that statute of limitations:

> "This statute, limiting a time within which action shall be brought, is for the benefit and repose of individuals and not to secure general objects of policy or morals. Its protection may, therefore, be waived by those who assent in legal form, and when acted upon, such waiver becomes an estoppel to plead the statute."

The court then went on to hold that the waiver of the statute of limitations in that case was valid and that the suit could be maintained despite the fact that it was brought following the expiration of the statutory period.

Similarly, in Michigan, waivers made with respect to limitation provisions containing the phrase "and not after" (Mich. Comp. Laws, 1871, Sec. 7148, and Mich. Ann. Stat., 1938, Sec. 27.605) have been held valid and binding: *Crane* v. *Abel*, 67 Mich. 242, 34 N. W. 658 (1887); *In Re Estate of King*, 94 Mich. 411, 54 N. W. 178 (1892). To like effect are *Dickson* v. *Slater Steel Rig Co.*, 138 Okla. 238, 280 P. 817 (1929), arising under similar statutory provisions in Oklahoma,* and *Smith* v. *Dupree*, 140 S. W. 367 (Ct. Civ. App. Tex., 1911), arising under similar statutory provisions in Texas.†

Petitioner in its brief in this Court (p. 26), in referring to this phrase "and not after," states that "It is universally known that the language in which a statute of limitations is ordinarily couched does not include the

* Okla. Rev. Laws 1910, Sec. 4657, and Okla. Ann. Stat., Tit. 12, Sec. 95.

† Tex. Rev. Stats. 1895, Art. 3356, Tex. Rev. Civ. Stat. 1925, Art. 5526.

above quoted phrase." Petitioner obviously did not examine many statutes of limitations, if it examined any. The phrase "and not after" or substantially similar phrases appear in a great many statutes of limitations, among which the statutes of the following states may be cited as examples, in addition to those referred to above: Alabama, Arizona, Arkansas, Colorado, Indiana, Mississippi, New Hampshire, New Mexico, Rhode Island, Vermont, Virginia.*

From this review of the authorities it is plain that there is nothing distinctive or decisive in the phrase "and not after," as used in the limitation provisions of the Interstate Commerce Act. The only significance which the phrase has either in that Act or in any of the many statutes of limitations in which it occurs is merely that it is an express statement of the statute's purpose to set up a bar to suits brought after the expiration of the statutory period. The phrase does not operate to prevent the bar of the statute from being regarded as a personal defense which may under proper circumstances be waived, and no case is known which has ever held that the phrase does so operate in any of the many statutes of limitations in which it occurs, excepting only Mr. Justice Lamar's *obiter* statement, made without any supporting authority and apparently without any examination of the history of the phrase or any indication of awareness that it occurred in many other general statutes of limitations which were nevertheless construed to be subject to waiver. For the reasons already indicated, that statement regarding the phrase "and not after" should be disregarded as unfounded and without warrant.

---

* Ala. Code, 1940, Tit. 7, Sec. 18; Ariz. Code, 1939, Secs. 29-203, 29-205, 29-206; Ark. Pope's Digest of Stats., 1937, Ch. 102, Secs. 8928, 8933; Colo. Ann. Stats., 1935, Ch. 102, Sec. 1; Ind. Burns' Ann. Stats., 1933, Secs. 2-601, 2-602; Miss. Code, 1930, Ch. 45, Sec. 2299; N. H. Rev. Laws, 1942, Ch. 385, Pars. 3, 4; N. M. Stats., 1941, Sec. 27-101; R. I. Gen. Laws, 1938, Ch. 510, Sec. 3; Vt. Pub. Laws, 1933, Ch. 72, Sec. 1648; Va. Code, 1942, Sec. 5810.

C. THERE IS NOTHING IN THE LEGISLATIVE HISTORY OF THE PROVISION LIMITING SUITS BY CARRIERS TO RECOVER THEIR CHARGES, WHICH INDICATES AN INTENT THAT A PROMISE NOT TO PLEAD THE LIMITATION SHALL NOT BE VALID AND BINDING.

Petitioner in its brief treats all the limitation provisions of the present Paragraph (3) of Section 16 of the Interstate Commerce Act as if they were all enacted together and originated in the same statute. This is far from being the case.

The limitation provision specifically involved here, viz., Section 16 (3) (a), applicable to suits by carriers to recover freight charges, was first enacted as part of the Transportation Act of 1920 (Act of February 28, 1920, c. 91, sec. 424, 41 Stat. 491-92). The other limitation provisions of Section 16 (3), including those which are successors of the provision involved in the *Phillips case*, have a different history. In order to understand the purpose and intent of the provision here involved (Section 16 (3) (a)), it is necessary to examine its history and its relationship to the other provisions with which it is now associated in the same sub-section of the Act.*

Prior to the Transportation Act of 1920, there had existed as a result of the enactment of the Hepburn Act of June 29, 1906 (34 Stat. 590), a limitation upon suits by shippers against carriers for recovery of damages in proceedings before the Interstate Commerce Commission and in court proceedings to enforce certain orders of the Commission. But the only limitations applicable to suits by carriers to recover their charges were those provided in the state statutes of limitations. Suits by carriers to recover their charges could then, as now, be brought, like other suits upon contracts, in the state courts, and prior to the Transportation Act of 1920 such suits

* Section 16 (3) first took its present form, with subdivisions designated (a), (b), (c), etc., in the amendment enacted by the Act of June 7, 1924, 43 Stat. 633.

were governed by the state statutes of limitations, just as other contract actions were so governed. Because of this, there existed a situation which presented the possibility of unfairness. By virtue of the limitation provisions enacted by the Hepburn Act of 1906 and applicable to suits by shippers for the recovery of damages, a complaint or suit by a shipper to test the reasonableness of the carrier's rate or its applicability under the published tariffs could be brought only within a period of two years following accrual of the shipper's cause of action. The carrier, however, was not barred from suing to recover its charges until the expiration of a much longer period, generally six years, as fixed in the applicable state statute of limitations. Accordingly, it was possible for a shipper from whom the carrier through mistake or inadvertence had not claimed the freight charges before the expiration of two years, to find himself confronted with a suit by the carrier for recovery of the charges, after it was too late for him to test the reasonableness of the rate which he would then be obliged to pay.

This situation was recognized by the Interstate Commerce Commission, and it was because of this situation, and only for that reason, that the Commission began to recommend, in its Annual Report for 1913, and continued thereafter to recommend, that Congress impose a limitation on suits by carriers to recover their charges which would be the same in period of time as the limitation on suits by shippers to test the propriety of the charges, so as to eliminate the possibility of unfairness described above. Thus, in its report for 1913, the Commission made the following recommendation (pp. 80-81):

> "In the present state of the law the statute of limitations for the beginning of proceedings by shippers to recover reparation on account of unreasonable rates is fixed at two years. The statute of limitations for the initiation of criminal prosecutions by the Federal authorities for failure to collect or to pay

the full amount of legally established transportation charges is three years. The statutes of limitations for the beginning of actions by carriers to recover unpaid transportation charges from shippers are provided by the several States and vary in the different States. Generally, however, they provide longer periods than is provided in the act to regulate commerce.

"From this instances of gross injustice result. Through inadvertence carriers sometimes fail to present bills to shippers for the legal amount of freight charges due. Such errors are discovered more than two years after the shipment has been delivered and all causes of action thereunder have accrued. The shipper thus finds himself liable to prosecution for failure to pay the legal rate, but, owing to the two-year statute of limitations, he is barred from beginning a proceeding to test the reasonableness of the charges assessed against him.

"We therefore recommend providing one period for beginning of all actions relating to transportation charges subject to the act. A provision should be made that all actions by carriers subject to the act for the recovery of compensation for any service subject to the act shall be begun within three years from the completion of such service, and that all complaints for the recovery of damages shall be filed with the Commission within three years from the completion of the service as to which damages are claimed, and not after."

This recommendation was repeated in subsequent annual reports of the Commission, and was again urged by Mr. Commissioner Clark, for the same reasons, in the hearings before the House Committee on Interstate and Foreign Commerce, held in September and October, 1919, on the bill which ultimately became the Transportation Act of 1920 (Hearings before House Committee on Interstate

and Foreign Commerce, 66th Congress, First Session, on H. R. 4378, pp. 2898-99).* As a result of these recommendations, the Transportation Act of 1920 included a three-year limitation on suits brought by carriers to recover their charges (see pp. 6, 32 above). While this limitation did not conform to the two-year limitation, which was retained, on suits by shippers, and therefore did not follow exactly the recommendation of the Commission, the purpose which the Commission had in mind was accomplished by the addition, likewise in the Transportation Act of 1920 (41 Stat. 491-92), of another provision, now known as Section 16 (3) (d) of the Interstate Commerce Act, which provided that where suit was begun by a carrier in due season for recovery of its charges, the limitation on suits by shippers to test the propriety of such charges would be extended to include ninety days from the time of the beginning of the carrier's action (43 Stat. 633).†

It is thus clear that the sole purpose of the enactment by Congress, in the Transportation Act of 1920, of the three-year limitation upon suits by carriers to recover their charges, together with the provision giving shippers an additional ninety days, from the time any such suit may be begun, to test the propriety of the charges, was to eliminate the possibility which theretofore existed that a shipper might be compelled to pay a carrier's charges at a time when it was too late for the shipper to test the

* The Conference Report which accompanied the Transportation Act of 1920, as finally agreed upon by both the Senate and House conferees, showed that the limitation provision in question had its origin in the House bill and not in the Senate amendment thereto (H. R. Report No. 650, 66th Congress, Second Session). It was on the House bill that the hearings above referred to, in which Mr. Commissioner Clark made his recommendation, were held.

† These limitation provisions were finally made uniform in time by the Transportation Act of 1940, which fixed two years as the limitation period applicable to actions by carriers for recovery of their charges and to actions or complaints by shippers for recovery of damages based on alleged unreasonableness of the rate or on inapplicability of the rate under the terms of the published tariffs (54 Stat. 912-13).

propriety of those charges. That purpose contains no element which would make invalid a waiver of the three-year limitation against carriers, voluntarily agreed upon by the shipper as a result of its voluntary request for an extension of time.

Petitioner contends that the limitation on actions by carriers (Section 16 (3) (a)) should be construed in the same way in which the limitation on actions by shippers (Section 16 (3) (b) and (c)) has been construed, *i. e.*, as destroying the cause of action upon the expiration of the limitation period (see above, p. 26), for the reason that both limitation provisions are contained in the same statute. The answer to this is two-fold. In the first place, petitioner's premise is erroneous, since the two limitation provisions were not enacted in the same statute. The Interstate Commerce Act is not a single statute. It is made up of many statutes, enacted at different times over a long period of years. As already shown above (pp. 32-35), the limitation provision applicable to suits by shippers was enacted in the Hepburn Act of 1906, while the limitation on suits by carriers was first enacted in the Transportation Act of 1920. In the second place, the two limitation provisions were motivated by entirely different purposes. The limitation upon suits by shippers, enacted in the Hepburn Act of 1906, was part of a whole series of provisions designed to strengthen the statutory safeguards against unjust discriminations and undue preferences and prejudices as between shippers. On the other hand, the limitation on suits by carriers, included in the much later Act of 1920, was enacted for the specific purpose indicated above, namely, to prevent a shipper from being compelled to pay the carrier's charges at a time when it was too late for the shipper to challenge their propriety. Plainly, therefore, there is no reason to suppose that Congress intended that the two limitation provisions should be construed alike.

It follows from what has been said above that there is nothing, either in the language of the limitation provi-

sion applicable to suits by carriers to recover their charges or in the purpose for which that provision was enacted, as shown by its legislative history, which would require a departure from the basic principle that a debtor's promise not to plead the statute of limitations, made to induce the creditor to refrain from bringing suit within the statutory period and relied on by the creditor in so refraining, is valid and binding on the debtor. It remains to consider petitioner's contention that the general policy of the Interstate Commerce Act, viz., to prevent unjust discriminations and undue preferences, requires that petitioner be permitted to repudiate its promise and thus altogether escape payment of the charges for which it is plainly liable on the merits.

III. There is Nothing in the Policy of the Interstate Commerce Act Which Requires that a Voluntary Agreement Made by a Shipper Not to Plead the Statute of Limitations Should Not be Enforced.

The final argument upon which petitioner's position appears to rest is that to hold petitioner to its agreement not to plead the statute of limitations would provide a device whereby it would be possible for carriers to commit unjust discriminations and bestow undue preferences among shippers, contrary to the policy and provisions of the Interstate Commerce Act. This is a startling argument for petitioner to make. Petitioner, having voluntarily requested respondent to grant it an extension of time purportedly for the purpose of investigating respondent's request for payment of the transportation charges, and having voluntarily agreed, for the purpose of obtaining such an extension, to refrain from pleading the statute of limitations, now seeks to repudiate its agreement on the ground that that agreement if valid would make possible acts which would be harmful to it as a shipper and to others of the same class, contrary to the provisions of the Interstate Commerce Act. Thus peti-

tioner in effect contends that it should not be compelled in this case to pay the charges which are lawfully due from it to the carrier, and which all other shippers in like position would be obliged to pay, because harm might thereby result to shippers as a class. The argument is an extraordinary one. Petitioner in effect charges that it has been treated with unlawful favoritism, and it therefore claims that it is entitled to be still more favored.

This is an argument without merit. In the first place, no question can arise of an actual discrimination or preference contrary to the provisions of the Interstate Commerce Act, under the circumstances of the present case. All that petitioner is here being asked to do is to pay the charges which it owes to respondent, and which all other shippers in petitioner's position would be required to pay. There is no question of any rebate or other undue advantage being given to petitioner or of any unjust discrimination or undue prejudice against petitioner. On the contrary, failure to hold petitioner to its promise and failure to require it to pay the charges which it owes would result in an actual unjust discrimination against other shippers and an undue preference in favor of petitioner, contrary to the principal purpose of the Interstate Commerce Act and in violation of its provisions, because petitioner would thereby be permitted to escape payment of the lawful charges for transportation services rendered to it as consignor, consignee and actual owner of the shipments in question.

That such a result is condemned by the Interstate Commerce Act is made clear by several of the cases cited by petitioner herein. For example, in *New York, N. H. & H. R. Co.* v. *California Fruit G. Exch.*, 125 Conn. 241, 5 A. (2d) 353 (1939) (cert. den. 308 U. S. 567, 60 S. Ct. 79), the Connecticut court, in holding that the carrier was entitled to recover its charges from the defendant, who was consignor, consignee and owner of the shipments, despite the fact that the carrier had delivered the shipments to

another party designated by the defendant without complying with defendant's instructions to collect the freight charges from such other party, quotes the following language (p. 357 of 5 A. 2d) from the case of *Central of Georgia Ry. Co.* v. *Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 425, 64 So. 202, 204 (1913), as follows:

> "'The necessary effect of all [the] decisions, construing and applying the Interstate Commerce Act, when considered together, is * * * that the carrier cannot, by any act estop itself from exacting the lawful freight rate. *If the carrier could so estop itself, then it would lie within the carrier's power, by purposely putting itself in a position where it could not exact the lawful rate of a shipper it desired to favor, to render nugatory one of the main designs of the act—the prevention of discrimination between shippers;* and for the law to countenance the doctrine of estoppel in cases like this is for the law to say, through the courts, that the carrier is estopped from doing what the statute mentioned plainly requires that it must do—collect the lawful rate in all cases, and nothing greater and nothing less, by any means or device whatsoever.'" (Emphasis supplied.)

Similarly, in *Chicago & N. W. Ry. Co.* v. *J. I. Case Plow Works*, 173 Wis. 237, 180 N. W. 846 (1921), another case cited by petitioner, it was said (p. 847 of 180 N. W.):

> "Unlawful acts of a carrier's agents in connection with charging and collecting the legal rates for transportation *cannot be made the foundation of an estoppel to prevent the carriers from enforcing the legal rate against those liable therefor.*" (Emphasis supplied.)

In other words, if petitioner's contention in this case prevails, then this Court, in so holding, will make possible

an actual commission of the very thing which Congress was at such pains to prevent, viz., the carriage of freight without the payment by the shipper of the freight charges lawfully due from it for such carriage.

The Supreme Court of California in its decision in the present case has aptly stated the matter in the following language (R. 203-04):

> "If we assume that the forebearance by the carrier under the written waiver of the shipper was a preference, and that the question is pertinent in this case, it does not follow that the forebearance under the circumstances was either forbidden or unreasonable. The main purpose of the agreement was not to extend credit to the defendant, but was to preserve the rights of the carrier. There is no justification for a conclusion that under the facts in this case the purpose was abused as a cover for extending an unreasonable preference. Moreover, the remedy for the giving of an unreasonable preference is the recovery of damages by the person discriminated against and who has been injured thereby. (Sec. 8, Interstate Commerce Act, 49 U. S. C. A.) An example is *Gamble-Robinson Commission Co.* v. *Chicago, N. W. Ry. Co.*, 168 F. 161, where an action was brought by a shipper who had not received the same credit terms accorded other shippers. The court said in that case that the Commerce Act left the carrier free to exercise all the rights and privileges under the common law insofar as they were not rendered unlawful by the act; that the act did not make all preferences or advantages unlawful, and that there was nothing unreasonable in requiring prepayment of freight in the case of one shipper and in extending credit to another. *If in the present case the defendant's contention in this respect were to prevail, the result would be that the shipper who has been the recipient of the preference would be deemed injured thereby. Certainly he*

should not be heard to contend that injury to him has resulted because he is compelled to discharge his liability to pay lawful freight charges—a liability which was created when the shipments were delivered and has never been discharged. The purpose of the act is to secure equal treatment to all shippers.

"It is founded on a sound public policy. But *that policy should not permit the favored shipper to urge discrimination against others for the purpose of enabling it to escape a liability which it was otherwise bound to discharge.*" (Emphasis supplied.)

It is entirely clear that on the facts of this case there would not only be no discrimination in permitting respondent to recover, but that on the contrary, so far as concerns the parties to this suit, a real and substantial discrimination in favor of petitioner would follow from accepting petitioner's contentions.

Despite this, however, petitioner urges that if a recovery is here allowed for the plaintiff, a precedent will be established which in future cases will open the door to the possibility of discrimination. This contention is founded on an attempt to extend and apply to this case a suggestion contained in certain language of the opinion in the *Phillips* case (see pp. 56-57 below). In that language this Court said in substance that to permit a *carrier* to waive defenses against shippers would be to bestow upon railroad companies the power to favor some shippers and discriminate against others, that if would therefore confer a power of giving preferences by means of "consent judgments", and that such a power should not be permitted to exist. Petitioner contends that this argument is equally applicable to a waiver by the shipper such as is involved in the case at bar, and that to recognize the validity of a waiver by the shipper would likewise result in creating opportunities for unlawful discrimination.

That this is not the case and that petitioner's argument is unsound will appear at once from a comparison of the two different situations.

Under the type of facts and circumstances presented by the case at bar, the carrier is not surrendering or waiving any defenses, as it was in the situation considered in the *Phillips* case. On the contrary, the carrier is here preserving and pressing its right of action, and it is the shipper who is surrendering a defense. What the rule in the *Phillips* case is obviously designed to do is to prevent the carrier from deliberately and intentionally exposing itself to a recovery by a favored shipper which it declines to permit to another less favored. This is the point of the Court's remark in that case that the carrier's power of making such a waiver would be equivalent to a right to suffer a consent judgment in favor of some shippers which would be barred as against others by the statute. Such a power on the part of the carrier would put it in the position of having an undue favor to bestow, the favor consisting of the substantial amount of money to be recovered by the shipper in the action to which the carrier surrenders its defense.

This danger of substantial discrimination is altogether absent in a state of facts like those involved in the case at bar, where the waiver of defense is by the shipper. The power of a shipper to make such a waiver does not put the carrier in any position to discriminate. The only discrimination, if discrimination there be, is against the particular shipper who has waived his defense and is therefore subject to suit when others are not; and, since this shipper has done so voluntarily and for a good consideration, he is certainly not in a position to complain of any undue or improper discrimination against him, as already pointed out.

If it should be seriously contended that the carrier is discriminating in favor of the shipper who waives the statute because it agrees to postpone suit against him for

the limited and reasonable period of the waiver, then the answer is that this amounts to no undue discrimination against other shippers, because the carrier is not in fact or in law required to sue all shippers at a date exactly equidistant from the accrual of the cause of action. Only by assuming such a requirement could it be claimed that other shippers were discriminated against where a carrier protracted negotiations with one delinquent somewhat longer than with another before actually filing suit.

Such mechanical identity of treatment of all shippers is not necessary to avoid the undue discrimination which the Interstate Commerce Act prohibits. To constitute such unlawful discrimination there must be, in the absence of express legislative definition to the contrary, something which can fairly be said to correspond to the idea of an improper benefit to the favored shipper or an actual harm to the shipper not favored. Certainly it would be straining language, as well as warping thought to an arid formalism, if such benefit or harm were held to result from a mere forbearance to sue, limited to a reasonable time, in exchange for a waiver of the statute of limitations for a corresponding period. By such an arrangement the carrier does not give up, as in the *Phillips* case, but on the contrary preserves its right of action; the shipper gets nothing but a brief and reasonable interval to determine its position, such as is incidental to the normal process of negotiations. To hold that such an arrangement may not lawfully be made would be to introduce an abstract and mechanical test into a practical business relationship, and would establish a purely formalistic requirement not in any sense needed to meet any real or potential evil, but solely for the purpose of attaining the impossible ideal of a complete mechanical identity of treatment between shippers.

How formalistic and futile it would be to hold invalid petitioner's waiver of the statute in the present case is shown by considering another state of facts which would

produce the same practical result that was sought to be accomplished by the challenged transaction here. Suppose, for example, that petitioner or any other shipper, impelled by considerations of equity or good conscience, were to pay a carrier freight charges which were lawfully due and owing but which the carrier had inadvertently neglected to collect and which had become barred by the statute of limitations. Would it be unlawful for the carrier to receive such payment of an amount which, because of the statute of limitations, it would be precluded from suing to collect? Obviously the receipt of such payment by the carrier would have precisely the same elements of discrimination, neither more nor less, that are here relied on by petitioner as grounds of illegality. In both cases the carrier would be receiving from one shipper what it might not be able to collect from another in a like situation; in both cases one shipper would be paying at a later time than the carrier could insist on payment by others. If these considerations are discriminatory in such sense as to invalidate the transaction, they should do so in both cases, if they do so in either. Yet the absurdity of the result in the case of the voluntary payment of charges barred by the statute is obvious. The only difference from the facts presented in the case at bar is that here, instead of a voluntary payment, there was a voluntary agreement to stand suit. There is no difference with respect to the alleged possibility of discriminatory results, and it is thus made more plain than ever by the case supposed that the alleged discrimination would consist only in an immaterial departure from complete mechanical identity of treatment of all shippers.

The Interstate Commerce Act has never purported to require a complete mechanical identity of treatment among shippers. This is conclusively shown by the fact that it outlaws only *unjust* discriminations and *undue* and *unreasonable* preferences and prejudices: *Texas and Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162

U. S. 197, 16 S. Ct. 666 (1896); *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 35 S. Ct. 370 (1915). In other words, for conduct to be unlawful under the Act, there must be shown not merely a technical difference of treatment, but a difference which has the quality of improperly advantaging one and improperly harming another. Clearly no such showing can be made with respect to a situation where the carrier preserves its right of action for a reasonable period in exchange for forbearance to sue during the same period, agreed upon as an incident to the procedure of negotiation and settlement.

The possibilities of harm inherent in such a situation are obviously far less than where a carrier extends credit to a shipper, because in the former case the reason for the forbearance is directly and immediately connected with the normal requirements of the process of negotiation. Yet even with respect to the granting of credit, until the subject was removed by legislation from the operation of general principle and brought within the scope of specific enactment, it was always held that there need not be a complete or mechanical identity of treatment between shippers. So long as the matter of extending credit was governed by the general terms of the Interstate Commerce Act and not by specific provisions applicable thereto, it was recognized and held by the courts that carriers were free to extend credit to one shipper and deny it to others if the circumstances under which the credit was extended in one case and denied in the other did not create a preference which was undue or unreasonable or a discrimination which was unjust. This is established in the leading case of *Gamble-Robinson Com. Co.* v. *Chicago & N. W. Ry. Co.*, 168 F. 161 (C. C. A. 8th, 1909). There, Judge Sanborn, speaking for the court, held that the refusal of the carrier to extend to the plaintiff the same credit that it customarily extended to other shippers did not amount to a violation of the Interstate Commerce Act, and in so holding said:

"That act [Interstate Commerce Act] left common carriers free to exercise to their full extent all the rights and privileges they had under the common law, so far as these rights and privileges and their exercise were not rendered unlawful by the provisions of that act. *That act did not make all preferences, advantages, prejudices, or disadvantages unlawful, but those only which are 'undue and unreasonable'* (p. 164).

* * * * * * *

"The true interpretation of that act is illustrated by the decisions which have been reviewed. It was expressed by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.* (C. C.) 43 Fed. 37, in these words, which have been subsequently three times affirmed and adopted by the Supreme Court of the United States as the true interpretation of this law:

'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give *undue preference* or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, *free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits'* (p. 167).

* * * * * * *

"The question, therefore, is, *did the defendant subject the plaintiff to any undue or unreasonable prejudice or disadvantage by requiring it to prepay the charges on its freight while the carrier cus-*

tomarily transported freight for others similarly situated without such prepayment? The defendant had the right under the common law to demand prepayment of its charges of the plaintiff and to grant credit to others for similar charges. It had the same right in this regard that every merchant, every man, and every corporation has to grant credit to one or to all but one, and to refuse it to others or to him. *There was nothing unjust or morally wrong in the exercise of this right, because the plaintiff had no moral right to the extension of credit, and justice did not require that the defendant should grant to the plaintiff the same credit that it extended to others.*

"The interstate commerce act did not expressly deprive the defendant of this right or make its exercise unlawful; so far as its express provisions are concerned, it left the right and its exercise among those which the Supreme Court declared that carriers were free to exercise and to manage upon 'the same general principles which are regarded as sound, and adopted in other trades and pursuits.'

"*The refusal to extend credit to a purchaser of goods, or of transportation, of financial responsibility, credit, and reputation equal to those of others to whom such credit is extended does not in the nature of things subject him to an undue or unreasonable prejudice or disadvantage,* while a requirement that such a vendor shall extend equal credit to all purchasers of equal financial responsibility, credit, and reputation, would subject him to unreasonable and undue disadvantage. Reason, sound business principles, and the practice of the business world give the option to extend credit to the seller of his property, or his services, and to the loaner of his money, and not to the purchaser or borrower. There are other considerations besides financial responsibility, credit, and reputation, which condition the rational extension of credit, such as the

> **experience of the seller or the loaner, the habits of the purchaser or the borrower, his fairness and promptness" (p. 168). (Emphasis supplied.)**

The same conclusion was reached by the Interstate Commerce Commission. In *Boise Commercial Club* v. *Adams Express Co.*, 17 I. C. C. 115 (1909), the Commission, in pointing out that the carrier is obliged by law to collect its charges in all cases, in order to avoid unjust discriminations and undue preferences, and that for this purpose the carrier may demand prepayment, said (p. 121):

> "To accept a shipment without prepayment is no more than *to extend credit* to the consignor, *and this within reasonable and nondiscriminatory limits it may do.*" (Emphasis supplied.)

See also *In Re Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 380, 399 (1912).

Thus it was the law, prior to the enactment of the Transportation Act of 1920, that carriers could within reasonable limits extend credit, *i. e.*, give additional time for payment, to some shippers and refuse such an extension of credit to other shippers. This was changed by the provisions of Section 3 (2) of the Interstate Commerce Act, added by the Transportation Act of 1920 (41 Stat. 479), which did not prohibit the extension of credit by carriers but only required such extension of credit thereafter to be subject to such rules and regulations as the Interstate Commerce Commission might require.*

---

* The provisions of that enactment were as follows (41 Stat. 479):

"From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia."

There is in the present case no question of any violation of the provisions of that section. Respondent in this case did not relinquish possession of the freight until it had received checks from petitioner's agent in the full amount of the freight charges. Its surrender of the freight upon receipt of those checks was in accord with its usual practice and with the regulations of the Commission, and it was not until it subsequently discovered the worthlessness of the checks that respondent was compelled to make further attempts to collect the charges, ultimately resulting in the negotiations and agreement with petitioner involved in the present suit.

Thus, all that respondent has done has been to agree with petitioner to forbear the institution of suit for a reasonable and strictly limited period of time and for a legitimate object. This is not prohibited by the provisions of Section 3 (2) or of any other section of the Interstate Commerce Act, and is justified by the same principles as those applicable to other extensions of time which have been held valid and nondiscriminatory where not specifically prohibited by the Act. For this Court now to hold that the respondent's extension of time in this case was improper and invalid, and that the shipper's waiver of the statute of limitations was likewise invalid because dependent thereon, would in effect amount to a judicial amendment of the Interstate Commerce Act so as to forbid, contrary to previously established law and established practice, a carrier from granting any extension of time to any shipper from whom it was attempting to collect its freight charges.

It follows from what has been said above that there is nothing in the agreement between petitioner and respondent which would render it, if enforced, a precedent tending to make possible future unjust discriminations and undue preferences in other cases. This is the real ground of distinction between the present case and the principal cases on which the petitioner relies, especially

A. J. Phillips Co. v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 35 S. Ct. 444 (1915), and cases following it, such as *Kansas City Southern R. Co.* v. *Wolf*, 261 U. S. 133, 43 S. Ct. 259 (1923). Because of the large number of cases of different types, cited by petitioner, it seems desirable to treat these in a separate section of this brief, for the purpose of showing that none of them is applicable to the present case. This will be done in the following section of this brief.

IV. The Decisions of This and Other Courts Do Not Support Petitioner's Position but on The Contrary Are Consistent with and Support Respondent's Position.

Of the more than sixty cases cited by petitioner, not one involves a waiver of the statute of limitations in an action brought by a carrier for the collection of freight charges.

So far as respondent has been able to determine, there has been only one reported decision on the precise question here involved, but the decision in that case is directly in point and squarely supports respondent's position. The case in question is *Pennsylvania R. Co.* v. *Susquehanna Collieries Co.*, 23 F. (2d) 499, decided by the District Court of the United States for the Northern District of Ohio on November 25, 1927. The following is the entire decision:

> "This cause is before me on defendant's demurrer to plaintiff's petition. Plaintiff's action is to recover demurrage charges. The point urged in support of the demurrer is that paragraph 3, Sec. 16, of the Interstate Commerce Act, as amended by Transportation Act 1920, Sec. 424 (Comp. St. Sec. 8584), requires that all actions at law by carriers subject to that act for the recovery of their charges or any part thereof shall be begun within three years from the time the cause of action accrues and not

after. Plaintiff's action was not commenced within three years. In excuse, it is pleaded that *within three years, and before the cause of action was barred, plaintiff and defendant entered into an agreement to waive the defense of the statute of limitations on condition that suit should not be brought within the statutory period, and that this agreement is still open and subsisting.* Plaintiff admits that under the Ohio practice the defense of the statute of limitations may be made by demurrer, if, on the allegations of the petition, the statute is applicable.

"Defendant urges that the right to recover demurrage charges is a right conferred by statute, to which is annexed as a condition that suit to recover must be brought within the statutory period, and hence that the right of action is barred, and cannot be prolonged or kept alive by an agreement such as would apply to an ordinary action.

"*Upon due consideration, I am of opinion that respondent's action to recover demurrage charges is not a right conferred by the Interstate Commerce Act, and is not within the authorities relied on by defendant. On the contrary, I am of opinion that plaintiff's right of action grows out of contract. This is none the less true, even though demurrage charges, like tariff rates, must be prescribed in a tariff filed with the Interstate Commerce Commission, and cannot be departed from or varied by the parties, either before or after the service is performed. The cases cited, arising under other provisions of the same section, have no application. In those cases the right of action did not grow out of contract, but out of the statute. No right of action existed except until and as the Interstate Commerce Commission made a finding of certain facts.*

"In view of this conclusion, it is unnecessary to consider whether a right created by statute, with a

condition annexed that it shall be enforced within a limited period, as suits for wrongful death, or actions on a reparation award of the Interstate Commerce Commission, may be kept alive by a voluntary agreement of the parties. It is difficult, however, to perceive any sound reason why it may not. Certainly none of the cases cited so hold.

"The demurrer will be overruled, and an exception may be noted." (Emphasis supplied.)

That decision appears to be the only case in the books involving the validity of such an agreement as that between petitioner and respondent in the present case, and it was there held that the agreement was valid and enforceable. As already stated, none of the cases cited by petitioner involves an action by a carrier against a shipper to recover freight or demurrage charges in which the shipper has waived or extended the provisions of Sec. 16 (3) (a) of the Interstate Commerce Act, by promising not to plead the limitation provisions therein.

Because of the very large number of cases cited by petitioner, it will simplify the discussion to devote this entire section to their consideration, and to analyze them under appropriate groupings. The cases cited by petitioner fall into the following classifications: (*a*) cases cited to sustain principles of law as to which there is no dispute in this case; (*b*) actions *against* carriers asserting causes of action created by the express provisions of the Interstate Commerce Act; (*c*) cases in which private arrangements between the parties are held invalid because they amount to actual unjust discriminations or undue preferences in violation of the express prohibitions of the Act; (*d*) actions by carriers against shippers which are distinguishable from the present case or which in principle support respondent's position in the present case.

Each of these groups of cases will be discussed separately.

A. Cases Cited as Sustaining Principles of Law Upon Which There is No Dispute in This Case.

Petitioner, at pages 8 and 9 of its "supplemental brief" in this Court, cites a number of cases in support of the propositions that a statute is to be construed in the light of its purpose and that the principal purpose of the Interstate Commerce Act was to eliminate unjust discriminations and unreasonable preferences among shippers. Respondent does not dispute these propositions, and there is therefore no need to discuss the cases cited in support of them.

B. Actions By Shippers Against Carriers Asserting Causes of Action Based Upon the Express Provisions of the Interstate Commerce Act.

The cases cited by petitioner which come within this group are the following:

A. J. Phillips Co. v. Grand Trunk Western Ry. Co., 236 U. S. 662, 35 S. Ct. 444 (1915). (pp. 13, 18, 19, 27).*

United States ex rel. L. C. Co. v. Interstate Com. Com., 246 U. S. 638, 38 S. Ct. 408 (1918). (pp. 15, 28).

Kansas City Southern R. Co. v. Wolf, 261 U. S. 133, 43 S. Ct. 259 (1923). (pp. 10, 13, 27).

Dauzer v. Gulf etc. R. Co., 268 U. S. 633, 45 S. Ct. 612 (1925). (p. 14).

Morgan's L. & T. R. etc. Co. v. Cocke, 273 U. S. 656, 47 S. Ct. 342 (1927). (p. 14).

Arkansas Fertilizer Co. v. United States; (I. C. C. Intervener), 193 Fed. 667 (1911). (pp. 16, 18, 38).

Allen v. New York, P. & N. R. Co., 15 F. (2d) 532 (C. C. A. 4th, 1926). (p. 47).

* The numbers appearing in parentheses after the citations refer to the pages of petitioner's "supplemental brief" in this Court at which the cases are cited.

Louisville & Nashville R. Co. v. *Cory*, 54 F. (2d) 8 (C. C. A. 6th, 1931). (pp. 14, 18, 39).

Zang v. *Railway Express Co.*, 130 Oh. St. 17, 196 N. E. 901 (1935). (pp. 14, 47).

Peninsula Produce Exch. v. *New York, P. & N. R. Co.*, 152 Md. 594, 137 A. 350 (1927). (pp. 14, 46, 53).

All these are cases of suits by shippers to recover damages for failure on the carriers' part properly to fulfill obligations specifically laid upon them by the Interstate Commerce Act and determined by the provisions of that Act, as, for example, their obligation to charge rates which are reasonable and in accord with their published tariffs (see discussion at pp. 18-25 above). Thus in all these cases, the suits were by the shippers against the carriers and were based on causes of action created by or derived from the Interstate Commerce Act. There is therefore an insurmountable distinction between all the cases in this group and the present case, first, because the causes of action sued on in those cases, being created by the Interstate Commerce Act, are subject to the rule that such a cause of action may be presumed to be terminated by the expiration of a limitation period contained in the same statute, in the absence of a contrary legislative expression of intent, and, second, because a result which would permit a *carrier* to waive the limitation provisions applicable to suits against it might well give rise to discriminatory practices, whereas such is not the case in a situation like that here presented, for the reasons above stated (see pp. 37-50 above).

This distinction between the cases cited by petitioner in this group and the present case can best be illustrated by a somewhat fuller consideration than has hitherto been presented of the leading case relied on by petitioner, which is also the case upon which practically all the other cases cited by petitioner are based, viz., *A. J. Phillips Co.* v.

Grand Trunk Western Ry. Co., 236 U. S. 662, 35 S. Ct. 444 (1915).

In the *Phillips* case certain carriers had filed a tariff with the Interstate Commerce Commission raising the freight rate on lumber. The Yellow Pine Association filed a complaint with the Interstate Commerce Commission contending that the increased rate was unreasonable. The Interstate Commerce Commission, after a hearing on the complaint, determined that the increase was unreasonable and required the carriers to return to their original rate.

The plaintiff was not a party to the proceeding before the Interstate Commerce Commission, but later brought an action under the provisions of the Interstate Commerce Act in a federal court for the recovery of damages based on the Commission's finding that the rates in question were unreasonable, the plaintiff having paid for certain shipments at those rates. The plaintiff made the order of the Interstate Commerce Commission a part of its complaint, and based its right to recover on that order.

The plaintiff had not filed its complaint within the two-year period then fixed by the Interstate Commerce Act for the commencement of actions by shippers against carriers to recover unreasonable charges. It sought to avoid the effect of that two-year limitation by contending that the case was governed by local state practice and that under such practice the carrier could not raise the defense of the statute of limitations by general demurrer to the declaration, which was the pleading that the carrier had filed. After stating, in the passage quoted above (p. 26), that under the limitation provision applicable to suits by shippers the lapse of time not only barred the remedy but destroyed the liability, Mr. Justice Lamar went on to say (p. 667 of 236 U. S.):

> "This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. The obligation of the

carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the *carriers*, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a *railroad company* to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the *waiver of defenses open to the carrier*. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as a matter of law, that the plaintiff had no cause of action." (Emphasis supplied.)

Thus, the actual decision of this Court in that case was simply that a suit by a shipper for damages, based on a finding by the Interstate Commerce Commission that the rate in question was unreasonable, and brought against the carrier after the expiration of the limitation period provided in the Interstate Commerce Act for such suits, was barred. There was no question of any waiver or extension of the statute of limitations or promise not to plead the statute. Moreover, the limitation provision

there before the Court was only that which was applicable to suits by shippers against carriers. At the time of that case the Act did not include any limitation on suits by carriers against shippers, which were then subject only to the state statutes of limitations, so that neither the decision nor the language in the *Phillips* case can be considered as having been intended to apply to the subsequently enacted limitation provision which is involved in the present case.

It was in answering an argument based on a point of local practice that Mr. Justice Lamar used the language quoted above, to the effect that if the statute were not construed to destroy the liability at the expiration of the statutory period, unjust discriminations *by carriers* among shippers would be made possible. Even if it be granted that that language was an essential part of the decision of the case, it has no application to the present suit, first, because in the situation there involved the shipper's suit asserted a cause of action created by the Interstate Commerce Act, viz., the right to recover damages with respect to rates found unreasonable by the Interstate Commerce Commission, while in the present situation, as previously pointed out (pp. 18-25 above), the carrier's cause of action is based not on the Act but on the carrier's common-law rights under the contract of carriage; and second, because if the statute of limitations were not held to destroy the *carrier's* liability to the shipper, it would become possible for the *carrier* to create unjust discriminations by pleading the statute against some shippers and not pleading it against other shippers. Where the suit is by the carrier against the shipper, as it is in the present case, it is the shipper and not the carrier who waives the defense of the statute of limitations, and where such waiver is made under circumstances like those here presented, there is no violation of either the provisions or the policy of the Act, for the reasons already stated (pp. 37-50 above).

It is thus seen that the situation presented where a carrier sues a shipper to recover the lawful charges due to the carrier for its transportation charges is entirely different from the situation in which a shipper sues a carrier to recover damages for excessive charges, and it is only in the latter situation that the decision of this Court in the *Phillips* case and the language quoted above from Mr. Justice Lamar's opinion has application.

For these reasons, all the cases cited by petitioner in this group, and any other cases which involve suits by shippers against carriers for damages based on allegedly excessive charges, have no application to the present suit. Most of these cases quote or paraphrase the language of Mr. Justice Lamar's opinion in the *Phillips* case. In some of these cases the language from the *Phillips* case was properly applicable, and in some of them it may not have been, but in any event it is clear that, considering the facts of those cases and considering the point of Mr. Justice Lamar's language in the *Phillips* case, none of those cases properly controls the decision of the case at bar.

C. Actions in Which Private Arrangements Between Shippers and Carriers or Privileges Claimed by Shippers Have Been Held to Constitute Actual Unjust Discriminations or Undue Preferences Contrary to the Express Prohibitions of the Act.

In this group are the following cases cited by petitioner:

Chicago & Alton R. v. *Kirby*, 225 U. S. 155, 32 S. Ct. 648 (1912) (p. 36);

Pennsylvania R. Co. v. *International Coal Mining Co.*, 230 U. S. 184, 33 S. Ct. 893 (1912) (p. 35);

Atchison, T. & S. F. R. Co. v. *Robinson*, 233 U. S. 173, 34 S. Ct. 556 (1914) (p. 34);

Georgia F. & A. R. Co. v. *Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541 (1916) (p. 24);

Texas & Pac. Ry. Co. v. *Leatherwood*, 250 U. S. 478, 39 S. Ct. 517 (1919) (p. 31);
Western Union Telegraph Co. v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584 (1921) (p. 35);
Chesapeake & Ohio Ry. Co. v. *Martin*, 283 U. S. 209, 51 S. Ct. 453 (1931) (p. 32);
American Railway Express Co. v. *American Trust Co.*, 47 F. (2d) 16 (C. C. A. 7th, 1931) (pp. 36, 47);
W. H. Blodget Co. v. *New York Central R. Co.*, 261 Mass. 365, 159 N. E. 45 (1927) (pp. 35, 53);
Pennsylvania R. Co. v. *S. M. Hamilton Coal Co.*, 144 Md. 556, 125 A. 405 (1923) (p. 35);
Northern Wisconsin P. Co. v. *Chicago & N. W. R. Co.*, 203 Wis. 549, 234 N. W. 726 (1931) (p. 36);
American Railway Express Co. v. *Shideler*, 88 Ind. A. 645, 165 N. E. 336 (1929) (p. 22);
Cohen v. *Texas etc. Co.*, 303 Ill. A. 606, 25 N. E. (2d) 562 (1940) (p. 33);
William F. Mosser Co. v. *Payne, Director etc.*, 92 W. Va. 41, 114 S. E. 365 (1922) (p. 33);
Rogers v. *East Carolina R. Co.*, 186 N. C. 86, 118 S. E. 885 (1923) (p. 24);
Spartan Mills v. *Davis*, 126 S. C. 312, 119 S. E. 905 (1923) (pp. 23, 30);
L. M. Kirkpatrick Co. v. *I. C. R. Co.*, 190 Miss. 157, 195 So. 692 (1940) (pp. 10, 31);
Shroyer v. *Chicago etc. R. Co.*, 111 Tex. 24, 222 S. W. 1095 (1920) (p. 33).

All these cases are examples of the settled rule that carrier and shipper may not by their conduct or by private arrangements between them bring about the accomplishment of an unjust discrimination or undue preference or prejudice contrary to the provisions of the Act. All of them involve actions *by shippers against carriers* in which the question was whether effect should be given to

private agreements, or to conduct on the part of the carrier, as a result of which some right was allegedly waived by the carrier or some privilege was claimed by the shipper, contrary to the provisions of the carrier's published tariff or otherwise under such circumstances that an actual unjust discrimination or undue preference was created, in violation of the provisions in the Interstate Commerce Act prohibiting such discriminations and preferences. The courts of course refused in all those cases to sanction enforcement of such agreements or give effect to such conduct. Those cases have no application to the present suit, because, as already shown (pp. 37-41), there is no question here of any actual unjust discrimination or undue preference contrary to the prohibitions in the Act against such discriminations and preferences.

D. Actions by Carriers Against Shippers Which Are Distinguishable From the Present Case or Which in Principle Support Respondent's Position in the Present Case.

The cases cited by petitioner which fall into this group are the following:

Chicago, I. & L. Ry. Co. v. *Peterson*, 168 Wis. 193, 169 N. W. 558 (1918) (pp. 36, 46, 53);

Chicago & N. W. R. Co. v. *J. I. Case Plow Works*, 173 Wis. 237, 180 N. W. 846 (1921) (pp. 36, 46);

New York, N. H. & H. R. Co. v. *California Fruit Growers Exchange*, 125 Conn. 241, 5 A. (2d) 353 (1939); cert. den. 308 U. S. 567, 60 S. Ct. 79 (1939) (p. 33);

Central R. R. Co. of N. J. v. *Mauser*, 241 Pa. 603, 88 A. 791 (1913) (p. 41);

Galveston H. & S. A. R. Co. v. *Webster, et al.*, 27 F. (2d) 765 (W. D. Tex., 1928) (pp. 14, 25, 38, 44);

Vicksburg etc. R. Co. v. *Paup, et al.*, 47 F. (2d) 1069 (C. C. A. 5th, 1931) (pp. 46, 52);

Wisconsin Bridge & Iron Co. v. *Illinois Terminal Co.*, 88 F. (2d) 459 (C. C. A. 7th, 1937) (pp. 14, 17, 20);

Button v. *A. T. & S. F. Ry. Co.*, 1 F. (2d) 709 (C. C. A. 8th, 1924) (pp. 14, 28, 39, 45);

Pennsylvania R. Co. v. *Carolina Portland Cement Co.*, 16 F. (2d) 760 (C. C. A. 4th, 1927) (pp. 14, 39, 43).

Of the cases in this group, the first four are of particular significance, because they embody a principle which lies at the basis of respondent's position here. In each of those cases it was specifically held that the shipper would not be permitted to rely on any special agreement, local custom, or other device to escape payment of the freight charges which were otherwise lawfully due from it to the carrier, because to do so would be to perpetrate an unjust discrimination, contrary to the provisions and policy of the Interstate Commerce Act, by permitting the shipper to receive transportation services without paying the lawful charges therefor. Thus, in *Chicago I. & L. Ry. Co.* v. *Peterson*, the carrier's agent had negligently failed to collect the freight charges from the person to whom the freight was delivered, and the defendants, who were both consignors and consignees and therefore liable for the freight charges under the bill of lading, resisted the carrier's claim on the ground that its failure to collect the charges was contrary to a long-established custom, alleged to prevail between carriers and shippers of the particular commodity in question, that freight charges should be collected from the person to whom the freight was delivered, upon presentation of the bill of lading. The Supreme Court of Wisconsin overruled this defense and held the carrier entitled to recover its charges from the defendants, saying (p. 197 of 168 Wis.):

"To give this alleged custom, therefore, the effect asked for by the defendants in this case, would be

to place them as shippers in a different and necessarily more favored position than other merchandise shippers in the same locality in whose favor no such custom existed. There can be no such preferences lawfully given or created by any agreements between carriers and shippers under the Interstate Commerce Law."

In *Chicago & N. W. R. Co.* v. *J. I. Case Plow Works,* the shipper, in resisting the carrier's suit for freight charges lawfully due it, relied on a defense practically identical with one advanced in the court below by petitioner herein and mentioned but not seriously urged in its brief in this Court. The shipper-defendant in that case claimed that the carrier's agent had presented to it an expense bill showing that the freight charges had been paid by the person designated by the defendant to receive the freight, pursuant to which the defendant had made reimbursement for the charges thus represented to have been paid. The defendant claimed that the carrier was estopped by the negligent representation of its agent to claim the charges from the defendant, who would thus be compelled to pay the charges twice. This defense was rejected by the Supreme Court of Wisconsin, which held the carrier entitled to recover its charges from the defendant, saying (p. 240 of 173 Wis.):

"Unlawful acts of a carrier's agents in connection with charging and collecting the legal rates for transportation cannot be made the foundation of an estoppel to prevent the carriers from enforcing the legal rate against those liable therefor."

The same answer applies to the similar defense advanced by petitioner in this case (see discussion at pp. 71-72 below).

In *New York, N. H. & H. R. Co.* v. *California Fruit G. Exch.,* the shipper-defendant contended that the car-

rier should not be permitted to recover the freight charges from it because the carrier, in delivering the freight to a firm designated by the defendant for such delivery, had neglected to carry out the defendant's instructions to collect the freight charges from that firm before delivering the freight, and thereafter was unable to collect the charges from the firm designated by the defendant because of that firm's insolvency. The Connecticut court referred to cases holding that a carrier cannot by any act estop itself from exacting the lawful freight rate (see passage quoted above, pp. 38-39), and held that the defense could not be allowed and the carrier should be permitted to recover the charges because to hold otherwise would be to permit the very thing which the Interstate Commerce Act primarily sought to avoid, viz., the transportation of freight without the payment by the shipper of the full amount of charges lawfully due therefor.

In *Central R. R. Co. of N. J.* v. *Mauser*, the shipper-defendant sought to escape liability for a portion of the charges due on the ground that the carrier's agent had misquoted the rate. The court held that the carrier could not thus be barred from collecting the full amount of the charges which under the Interstate Commerce Act it was required to collect from all shippers alike.

Thus the effect of these four decisions was that the carrier was entitled to collect the freight charges and that the parties could not be permitted to use any means or device to enable the shipper to escape making such payment. If the reasoning of the courts in those cases is applied to the facts of the present case, petitioner will be precluded from accomplishing such a result, which it is apparently endeavoring to accomplish in this appeal.

The remaining five cases within this group constitute the only cases cited by petitioner which involve the effect of Section 16 (3) (a) of the Act, containing the limitation provision here in question, in suits by carriers against shippers. All these cases are distinguishable from the

present case and do not support petitioner's position. Before taking up each of them separately, it should be noted that in none of these cases was there involved any agreement not to plead the statute of limitations or any waiver or extension thereof. All of them were cases in which the holding of the court was merely that the carrier's suit was barred because the statutory limitation period had expired. The cases are cited by petitioner only because the courts used broad language usually borrowed from the opinion in the *Phillips* case and other cases following it, which language was not necessary to the decision, which was based and was supportable on other grounds. Consideration of each of these cases separately will show that petitioner can derive no support for its position therefrom.

In *Galveston H. & S. A. R. Co.* v. *Webster, et al.*, 27 F. (2d) 765 (W. D. Tex. 1928), a district court case decided in a slight and informal opinion, the carrier sued on a bond to recover freight charges from the shipper and its surety. The suit was brought more than three years after the carrier's cause of action had accrued, so that it was clearly barred as against the shipper. The only question was whether the carrier's claim was likewise barred against the surety, or whether recovery could be had under certain state statutes and procedures affecting the liabilities, rights and remedies of principal and surety. In holding that the limitation provision in the Interstate Commerce Act barred the claim against the surety as well as against the shipper-principal, the court pointed out that it was the purpose of Congress in enacting the limitation provision in question to provide one which would supersede the state statutes of limitation, and thereby eliminate the variations that existed under the state statutes. This holding was of course in accord with the legislative history of the limitation provision, as pointed out above (pp. 32-37). The court went on, however, to add a quotation from the *Phillips* case, which was

neither necessary to its decision nor appropriate to the facts before it.

In *Vicksburg etc. R. Co.* v. *Paup, et al.*, 47 F. (2d) 1069 (C. C. A. 5th, 1931), the sole question was whether a carrier's suit to recover charges erroneously refunded was governed by the state statute of limitations or by the limitation contained in the Interstate Commerce Act, and the court held that the federal statute governed, its purpose being to eliminate the variations which had existed as a result of the application of the different state statutes. In so holding, the court cited the *Phillips* case and other cases following it, as authority for the proposition that to permit the varying provisions of state laws to apply would "open the door to evasion and discrimination." Even if this language be accepted as appropriate to the decision, it has no application to the present case, since there is here no question as to whether or not the present type of suit is subject to the state statutes of limitations or to the federal statute. It is not disputed that the federal statute is applicable. The case therefore lends no support to petitioner's position.

In *Wisconsin Bridge and Iron Co.* v. *Illinois Terminal Co.*, 88 F. (2d) 459 (C. C. A. 7th, 1937), the charges on which the freight had originally been billed had been fully paid by the shipper, and thereafter the carrier sought to collect additional charges which it claimed were due. The shipper applied to the Interstate Commerce Commission for a determination of the lawful rate applicable to the shipments in question, and in that proceeding also raised a question as to the reasonableness of the rates. Ultimately the Commission held that additional charges were due, based upon a rate which was not the published tariff rate at the time of the shipments but which was found by the Commission to be reasonable and proper (*Wisconsin Bridge and Iron Co.* v. *Illinois Term. Co.*, 169 I. C. C. 197 (1930)). The shipper filed a peti-

tion for rehearing with the Commission and the carrier refrained from suing for the additional charges pending the disposition of the petition. After the petition was denied, the carrier brought suit, but in the meantime the three-year statutory period applicable to the carrier's claim had expired. There was no agreement by the shipper not to plead the statute, and the only basis on which the carrier rested its claim that the statute should not apply was the argument that the shipper was estopped to plead the statute because the carrier had permitted the period to expire for the purpose of allowing the shipper to seek rehearing before the Commission. Of course the case was not a proper one for the application of the doctrine of estoppel, because it did not appear that there was any representation or any promise made by the shipper and relied on by the carrier, to the effect that the statute of limitations would not be pleaded. Moreover, the cause of action asserted by the carrier in that case was plainly one which was created by the Interstate Commerce Act, since the question involved was as to the amount due and the carrier's suit was based on the Commission's ruling as to the reasonableness and propriety of the rate (see pp. 19-23 above). The court added, as an additional reason for its conclusion, the statement that under the decision in the *Phillips* case and the cases following it the lapse of time had destroyed the liability altogether. This statement was in no way necessary to the decision of the case, and, if accepted, involves an extension of the doctrine of the *Phillips* case not warranted, for the reasons already stated. Therefore, this case cannot be considered as affording proper support for petitioner's position here.

In *Button* v. *Atchison, T. & S. F. Ry. Co.*, 1 F. (2d) 709 (C. C. A. 8th, 1924), a situation somewhat similar to that in the *Wisconsin Bridge & Iron Co.* case was presented. The suit in the *Button* case was a suit by a carrier to collect additional charges, claimed to be due

under the applicable tariff rate, from the shipper who had previously paid in full the charge originally quoted to him. The court stated at the outset that there was no promise by the shipper to pay the charges claimed and that therefore the suit was one which was based, not upon the carrier's common-law rights under the contract of carriage, but solely upon the Interstate Commerce Act. Thus it said (pp. 709-10):

> "It is plain upon these facts that at common law the carrier could not have recovered of the shipper any *additional sum* as freight. *Its right to maintain the present suit is created by the Interstate Commerce Law* (Comp. St. §8563, *et seq.*). It arises out of the provision of that act which requires the carrier to collect, and the shipper to pay, the full charge named in the tariffs filed by the carrier with the Interstate Commerce Commission. * * * both the complaint and the judgment base the carrier's right to recover solely upon the Interstate Commerce Law." (Emphasis supplied.)

The shipment in question had moved prior to the enactment in 1920 of the limitation provision applicable to suits by carriers, but the carrier's suit had not been brought until after the enactment of that provision, and the question was whether that provision or the state statute of limitations was applicable. The statutory period provided in the state statute of limitations had expired, and the three-year period provided by the federal statute had expired if that three-year period were measured from the time the shipment in question moved. The carrier contended that the limitation provision in the federal statute should be applied and should be measured only from the date of enactment of that provision. But the court held that the carrier's rights could not be enlarged in that way and that, whether the federal or the state

statute of limitations applied, the limitation period should be measured from the time the cause of action accrued, so that in either event the limitation period had expired. As stated by the court (p. 711):

> "No injustice is done by combining the two statutes, and simply giving the carrier the benefit of the full term to which it was entitled at the time its action accrued."

Thus the court in that case rested its decision on a clear and proper ground which did not in any way involve the principle of the *Phillips* case and cases following it, viz., the ground that the applicable statutory period had expired, and there was no reason to enlarge or extend the statutory period. The court then went on to cite, as an additional ground for its decision, the principle of the *Phillips* case, but in so doing again stated that the plaintiff's cause of action was a creature of the statute which contained the limitation provision, in the following language (p. 711):

> "There is another ground upon which the case may be rested. Plaintiff's right of action is given by statute. It was not created for its enrichment, but to protect the public against secret rebates and discriminations. It is not a right of contract or of property. The right, therefore, is at all times under the full control of the legislature."

Plainly, that case on its facts and on the court's own reasoning has no application to the present situation. As the court itself said in that case (p. 712):

> "It is best to dispose of this case upon its own facts."

In *Pennsylvania R. Co.* v. *Carolina Portland Cement Co.*, 16 F. (2d) 760 (C. C. A. 4th, 1927), the shipment of freight in question was refused by the company which the shipper had designated to receive the shipment and the shipper neglected to give the carrier any further directions as to the disposition of the shipment. After the shipment was held by the carrier in storage for a time, the carrier sold it, and sued the shipper to collect the difference between the freight, storage and demurrage charges due and the amount received from the sale. The suit was brought more than three years after the tender of delivery of the shipment, and the principal question was whether or not the statutory period should be measured from that date or from the date of the subsequent sale by the carrier. The court held that, under the language of the Interstate Commerce Act and particularly Section 16(3) thereof, the cause of action must be considered to have accrued at the time of the tender of delivery of the shipment, with the result that the suit was barred by the statute of limitations. There was no question of any waiver or promise by the shipper not to plead the statute. However, in answering a secondary argument, to the effect that the defense of the statute of limitations could not be raised under the demurrer which the shipper had filed, the court cited the *Phillips* case and cases following, in support of the following statement (p. 762):

> "The cause of action is one created by statute, which fixes a time within which action must be brought as an essential element of the right to sue, and in such cases it is well settled that a declaration or complaint which shows on its face that the action was not brought within the time prescribed is demurrable."

Clearly, the court, in thus stating that the cause of action on which the carrier sued was created by statute, proceeded on a wrong premise. If that premise had been correct, the court's citation of the *Phillips* case would

doubtless have been appropriate. But, for the reasons stated above (pp. 18-25 above), it is not correct to say that a carrier's right to recover charges due it under its contract of carriage is created by the Interstate Commerce Act. There was no question as to the propriety of the amount of the charges claimed by the carrier or as to the proper interpretation of the carrier's published tariff, and therefore the carrier's cause of action was based on its common-law rights under the contract of carriage, and not on the Act. To that extent the decision of the court was placed on an erroneous ground, and therefore it cannot in that respect be considered as properly having any controlling effect on the decision of the present case.

Thus it is clear that in none of the cases cited by petitioner was there presented a situation comparable to that involved in the case at bar. In none of those cases was there any waiver of or promise not to plead the statute of limitations, and therefore the question of the validity of such a waiver or promise was not decided by any of them. Nor was there at issue in any of those cases the question whether an agreement of the character here involved would constitute a vehicle or device for discrimination which the policy of the Interstate Commerce Act requires to be struck down. On the contrary certain of those cases (see pp. 61-64 above) make it abundantly clear that any agreement or device relied on by a shipper for the purpose of avoiding payment of the charges lawfully due from it should not be permitted to stand in the way of the carrier's collection of the charges, in view of the policy of the Act against discrimination and the consequent requirement that the proper freight charges must be collected from all shippers alike. Petitioner's cases, when properly read and understood in the light of their facts and of the facts and reasoning in the *Phillips* case, do not support its position but on the contrary are consistent with that of respondent.

V. Respondent Is Not Estopped to Collect the Lawful Charges by Reason of Respondent's Dealings with Petitioner's Agent.

In the courts below petitioner unsuccessfully urged, as an additional defense, that respondent was estopped to collect the charges in question from petitioner because respondent had accepted checks from petitioner's agent, Jerome Company, and had thereupon receipted the freight bills and left them in Jerome's possession, on the basis of which Jerome secured a credit against petitioner for the amount of the charges. Petitioner ultimately conceded in the proceedings below that a defense of estoppel could not be maintained against a carrier's suit to collect charges lawfully due it, and this defense is not argued in petitioner's brief in this Court. However, it is briefly suggested at the conclusion of petitioner's statement of the case in its brief in this Court, and it therefore seems worth while to call the attention of the Court to the decisions which have made it plain that petitioner may not maintain such a defense in a case of this character.

The principal decisions on this point are those of this Court in which it has specifically held that a carrier may not be estopped to collect transportation charges lawfully due it, in view of the fact that the Interstate Commerce Act's policy against discrimination requires that every carrier be obliged to collect the charges lawfully due for its transportation services. This was held in *Pittsburgh, etc. Ry. Co.* v. *Fink*, 250 U. S. 577, 40 S. Ct. 27 (1919), where the shipper resisted the carrier's claim on the ground that he had paid all that the carrier had demanded of him and that the carrier was, therefore, estopped to collect more, and this Court, in holding the shipper liable, rejected that argument in the following language (pp. 582-3 of 250 U. S.):

> "Nor can the defendant in error successfully invoke the principle of estoppel against the right to

collect the legal rate. Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute."

That holding was reaffirmed by this Court in *N. Y. Cent. R. R.* v. *York & Whitney Co.*, 256 U. S. 406, 41 S. Ct. 509 (1921), and again in *Louisville & N. R.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441 (1924), where Mr. Justice Brandeis, citing the *Fink* and *York & Whitney* cases, said that no act or omission of the carrier could "estop or preclude it from enforcing payment of the full amount by a person liable therefor" (p. 65 of 265 U. S.).

The same principle has been stated and applied many times by other courts. See, for example, *Chicago & N. W. Ry. Co.* v. *J. I. Case Plow Works*, discussed and quoted above (p. 62), where the facts regarding the alleged estoppel were practically identical with those in the present case, and the point was decided against the shipper; *New York, N. H. & H. R. Co.* v. *California Fruit G. Exch.*, likewise discussed and quoted above (pp. 62-63); *Central of Georgia Ry. Co.* v. *Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 So. 202 (1913); *New York Central R.* v. *Phila. & Reading Coal & Iron Co.*, 286 Ill. 267, 121 N. E. 581 (1919).

Plainly, there is no merit in this argument made below by petitioner, as petitioner apparently now realizes.

CONCLUSION.

It is submitted that, for the reasons stated above:

1. Petitioner's written promise not to plead the statute of limitations, made prior to the expiration of the statutory period for the purpose of inducing respondent to refrain from suing to collect petitioner's debt, and in

reliance upon which respondent agreed to forbear and did actually forbear bringing suit for a short specified period of time, is one which would unquestionably have been enforced at common law, by refusing to permit petitioner to plead the statute in repudiation of its promise;

2. Respondent's suit in this case, being a suit by a carrier to collect the full amount of the unpaid charges lawfully due it from a shipper for the transportation of the shipper's freight, and which the shipper in the bills of lading duly promised to pay to the carrier, is one which asserts a cause of action not created by or derived from the Interstate Commerce Act but based on respondent's rights as carrier and petitioner's obligations as shipper under the contract of carriage between them, and therefore this case does not fall within the line of cases holding that a cause of action wholly created by statute is presumed to have been intended by the legislature to be destroyed upon the expiration of the limitation provision provided in the same statute;

3. There is nothing in the language of the limitation provision contained in Section 16 (3) (a) of the Interstate Commerce Act which would require that petitioner's promise not to plead the statute of limitations should be held invalid; the phrase "and not after" in that provision is of no significance with respect to the issue here in question, and does not serve to distinguish that provision from other statutes of limitations generally;

4. There is nothing in the policy of the Interstate Commerce Act to require that petitioner's promise not to plead the statute of limitations should be held invalid, since under the circumstances of this case that promise did not constitute, and was not part of an arrangement giving rise to, any actual unjust discrimination or undue preference contrary to the prohibitions of the Interstate

Commerce Act, nor did it constitute a precedent making possible such unjust discriminations and undue preferences in other cases; on the contrary, if petitioner's position were sustained, an actual unjust discrimination and undue preference in favor of petitioner would thereby be made possible, since petitioner would be permitted to escape payment of the lawful charges which all other shippers in like position are required to pay;

5. None of the cases cited by petitioner holds that an agreement by a shipper not to plead the statute of limitations, such as that involved in the present case, is invalid and none of those cases can properly be considered as controlling the decision in the present case.

Accordingly, it is submitted that the judgment of the Supreme Court of California in this case should be affirmed.

Respectfully submitted,

JOHN DICKINSON,
WILLIAM F. ZEARFAUS,
JOHN B. PRIZER,
1740 Broad Street Station Building,
Philadelphia, Pa.
Counsel for Respondent.

FREDERIC D. MCKENNEY,
W. H. STAMMER,
Of Counsel for Respondent.

pp. 2, 9

SUPREME COURT OF THE UNITED STATES.

No. 40.—October Term, 1943.

Mid State Horticultural Co., Inc., Petitioner, *vs.* The Pennsylvania Railroad Company.	On Writ of Certiorari to the Supreme Court of California.

[November 22, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

The case is here on certiorari to the Supreme Court of California. Respondent sued to recover the full amount of freight charges on twenty-one carloads of grapes shipped by petitioner over its own and connecting carriers' lines from California to stated destinations in New York and New Jersey. The ultimate question is whether the action was brought in time under Section 16(3)(a) of the Interstate Commerce Act. This provided:

All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.[1]

---

[1] 49 U. S. C. § 16(3)(a), 43 Stat. 633. Other pertinent parts of Section 16, as it was in force when this cause of action arose, were as follows:

"(3)(b) All complaints against carriers subject to this Act for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

"(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this Act within three years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

"(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the three-year period of limitation in subdivision (c) a carrier subject to this Act begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier."

As to the section's legislative history, including changes made since this suit arose, see note 15 *infra*.

In the application presented by this record, the question turn on whether the section's limitation can be waived by expres agreement made before the period ends. The agreement wa made, at petitioner's request, three days before the term ex pired for suing on account of the first shipment. By its terms in consideration of respondent's forbearance to sue for a spe cified time, petitioner undertook not to "plead in any such suit th defense of any general or special statute of limitations."[2] Tw months later, but within the extended time, petitioner finall declined to pay and respondent began this action.[3]

In all stages of the litigation petitioner has contended tha the statute prohibits maintenance of the action, notwithstandin its agreement. Respondent has taken the contrary view, as hav the California District Court of Appeal, one judge dissentin (124 P. 2d 902), and the California Supreme Court (21 Ca 2d 243). We think petitioner's position must be sustained. I short this is that the agreement is invalid as being contrary t the intent and effect of the section and the Act.

In classical statement, the question has been posed as whethe the section operates, with the lapse of time, to extinguish th right which is the foundation for the claim or merely to bar th remedy for its enforcement;[4] and in this case, consistently wit

[2] After various recitals, including one fixing the time within which the d ferred suit might be brought, the agreement provided:

"Now, therefore, in consideration of the forebearance [sic] of The Pen sylvania Railroad Company to bring such a suit against the Mid State Hor cultural Company, Inc. prior to October 28, 1935, the said Mid State Hortic tural Company, Inc. hereby agrees that if and when The Pennsylvania Ra road Company may find it necessary to bring such an action, it, the said M State Horticultural Company, Inc., will not plead in any such suit the d fense of any general or special statute of limitations. . . . ."

[3] The following additional facts reveal more of the full character of t controversy:

In accordance with petitioner's diversion orders, respondent delivered t shipments to Jerome Distributing Company in October and Novemb r, 193 Jerome gave respondent its checks to cover the freight and received receipt freight bills, which it used to obtain a settlement of accounts with petition the latter says it would not have made without them. The checks were d honored on presentment for payment. Thereafter respondent sought witho success to collect from Jerome. It sued and obtained a judgment which could not satisfy because of Jerome's insolvency.

The time for suing on account of the first shipment expired October 1935. Some time before this respondent apparently threatened to sue pe tioner and the latter requested time to investigate. Respondent acceded, a on October 25, 1935, petitioner executed the agreement not to plead the statu

[4] The inquiry traditionally is cast in this mold regardless of whether t ultimate question concerns such varied problems as the propriety of invoki the *lex fori* rather than the *lex loci*, of waiving the defense or estopping t

the pattern, the debate has moved back to whether the cause of action is one created by the statute or one arising from the common law,[5] with the attributed consequence in the one case that the bar is absolute and invariable by any act of the parties, in the other that it may be waived by contract or otherwise.[6] Petitioner urges that the carrier's common law right to collect transportation charges from the shipper, which was strictly contractual, no longer exists, but has been replaced with one prescribed by the Act. This, it says, now fixes the character and dimensions of the carrier's recovery, including the time within which it may be had. Respondent however insists the Act has not superseded, but has merely modified its common law contractual right; and in this respect it asserts a distinction between cases, like this one, in which the carrier seeks the full amount of the transportation charges and others in which the suit is for only a part of them[7] or in which the shipper sues the carrier to recover excess charges paid or damages for the charging of unreasonable rates.[8]

We do not think the decision should turn on refinements over whether the residuum of freedom to contract which the Act leaves to the parties or the quantum of restriction it imposes[9] constitutes the gist of the action. Origin of the right is not *per se* conclusive whether the limitation of time "extinguishes" it or "merely bars the remedy" with the accepted alternative conse-

---

defendant from asserting it, or of extending the period of limitation after it has once lapsed. See, e. g., Story, Conflict of Laws (8th ed.) § 582; Beale, Conflict of Laws (1935) §§ 604, 605; Goodrich, Conflict of Laws (1927) §§ 85, 86; Ailes, Limitation of Actions and the Conflict of Laws, 31 Mich. L. Rev. 474; Bement v. Grand Rapids & Ind. Ry., 194 Mich. 64; Gauthier v. Atchison, T. & S. F. Ry., 176 Wis. 245; McLearn v. Hill, 276 Mass. 519; Danzer & Co. v. Gulf & Ship Island R. R., 268 U. S. 633.

[5] Characteristically the inquiry follows this course too, however diverse the ultimate questions, in actions under wrongful death statutes, the Federal Employers' Liability Act, or directors' liability statutes, whether the limitation is imposed in the act creating the liability or a different one. See note 4 *supra* and cf. Davis v. Mills, 194 U. S. 451.

[6] Compare, e. g., Bement v. Grand Rapids & Ind. Ry., 194 Mich. 64, with McLearn v. Hill, 276 Mass. 519.

[7] E. g., Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. 2d 459 (C. C. A.); cf. Button v. Atchison, T. & S. F. Ry., 1 F. 2d 709 (C. C. A.); Galveston, H. & S. A. Ry. v. Webster Co., 27 F. 2d 765 (D. C.).

[8] E. g., A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U. S. 662; Kansas City Southern R. R. v. Wolf, 261 U. S. 133.

[9] Cf. Louisville & N. R. R. v. Central Iron & Coal Co., 265 U. S. 59; Alton R. R. v. Gillarde, 379 Ill. 308; Pennsylvania R. R. v. Lord & Spencer, 295 Mass. 179; Galveston, H. & S. A. Ry. v. Webster Co., 27 F. 2d 765 (D. C.).

quences respecting waiver. Source is merely evidentiary, with other factors, of legislative intent whether the right shall be enforceable in any event after the prescribed time, which is the ultimate question.[10] The test of creation may aid when origin is clear.[11] It is not conclusive when the source is hybrid, as is true of the carrier's contract, which has become a complex or resultant of the former freedom of contract and statutory restrictions. It does not follow from the survival of the common law elements, as respondent maintains, that Congress did not intend the limitation to be absolute. And this seems impliedly conceded when the debate shifts, as it has, to whether the policy of interstate commerce legislation contemplates the one result or the other. This is the controlling question. Respecting it the consistent patterns of legislation followed in the Act and of judicial decision in treating problems of time limitation and related questions arising under it furnish the more persuasive indicia of Congress' intention.

Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates.[12] Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This "obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." *Louisville & Nashville R. R.* v. *Maxwell*, 237 U. S. 94, 97.

With setting in such a statute, Section 16 expresses the specific policy of the Act with reference to the assertion of stale claims. On the section's face, this policy is one of uniformity and equality of treatment, as between carrier and shipper. The section con-

[10] Davis *v.* Mills, 194 U. S. 451, 454; see also Gregory *v.* Southern Pacific Co., 157 Fed. 113 (C. C. D. Ore.); Osborne *v.* Grand Trunk Ry., 87 Vt. 104.

[11] *Ibid.*

[12] Cf. Pittsburgh, C. C. & St. L. Ry. *v.* Fink, 250 U. S. 577; Louisville & Nashville R. R. *v.* Maxwell, 237 U. S. 94; Arkansas Fertilizer Co. *v.* United States, 193 Fed. 667 (Commerce Court).

ins not one, but several limitations. All are of short duration.[13] ney apply to various kinds of relief allowed in relation to matters verned by the Act. These include proceedings before the Com- ission and in the courts, by both shippers and carriers. The veral provisions are cast in uniform terms.[14] Not all were ought into the section at the same time. But the legislative story shows a constant tendency toward making them uniform time and the purpose of placing the carrier and the shipper equal terms in this respect.[15] Upon the face of the section thing suggests that the limitations are to be given other than entical effects, except as the language specifies variations. In rticular, contrary to respondent's contention, there is no indi- tion that, in applying the section, the carrier shall be given an dvantage not allowed to the shipper or one, in some instances, hen the carrier is plaintiff, which it cannot enjoy in others. ather, the section's terms, particularly in subdivision (a),[16]

[13] The uniform period is now two years. Cf. note 15 *infra*.

[14] All follow the formula "within —— years, but not after." Respondent ghtly says the formula itself, particularly as it includes "and not after," not conclusive, since it has received different constructions in respect to the esent issue. Thus, the phrase appeared in the earliest English general atutes of limitations, cf. 7 Chitty's English Statutes (6th ed.) 618-619, 9-625; and is found frequently in state statutes without having the effect outlaw waivers. Cf. Bewley *v.* Power, Hayes & Jones Exch. Rep. 368 833); Crane *v.* Abel, 67 Mich. 242; In re Estate of King, 94 Mich. 411; ickson *v.* Slater Steel Rig Co., 138 Okla. 238. On the other hand, special atutes employing the phrase have received opposing constructions. Cf. e state wrongful death statute involved in The Harrisburg, 119 U. S. 199. ee generally 132 A. L. R. 292 *et seq.*

[15] For the succession of enactments by which Section 16(3) assumed its esent form see 34 Stat. 590; 41 Stat. 491-2; 43 Stat. 633; 54 Stat. 912-3; 49 U. S. C. A. § 16(3), Historical Note. Briefly, Section 16(3)(a) was acted first as part of the Transportation Act of 1920, 41 Stat. 491-2. reviously state statutes supplied limitations upon carriers' suits for their harges, cf. Button *v.* Atchison, T. & S. F. Ry., 1 F. 2d 709, and upon certain ippers' suits against carriers (not based upon an order of the Interstate ommerce Commission), cf. Louisiana & W. R. R. *v.* Gardiner, 273 U. S. 280. oncurrently from 1906 the Hepburn Act (34 Stat. 590) supplied limitations pon shippers' assertion of claims for damages before the Interstate Com- erce Commission and in suits to enforce its orders. Section 16(3) assumed ubstantially its present form in the Act of June 7, 1924, 43 Stat. 633; al- ough after this action was brought the Transportation Act of 1940, 54 Stat. 12-3, reduced the period for carriers' suits from three to two years, to make conform finally with the time allowed shippers for testing the reasonable- ess of the carrier's rate, etc. From 1920 to 1940 this conformity had been chieved by extending the time for shippers' proceedings where the carrier a due season began suit to recover its charges. Cf. 43 Stat. 633, § 16(3)(d).

[16] The subdivision applies a single limitation to "*all* actions at law by arriers," whether "for recovery of their charges, *or any part thereof.*" Emphasis added.) Cf. note 1 *supra*.

their uniformity in all the limitations, its legislative history, and its setting in a statute designed certainly as much for the shipper's as for the carrier's benefit and in so many respects to avoid discriminatory practices and effects, all point to uniform construction of the limitations imposed. And this, we think, is the effect of the decisions which have construed them or predecessor provisions.[17]

With a single exception, *Pennsylvania R. R.* v. *Susquehanna Collieries Co.*, 23 F. 2d 499 (D. C.), the federal courts have not decided squarely whether an agreement such as is presented here is valid. In that suit to recover demurrage charges the court sustained and gave effect to the contract. But we think this is contrary to the general course of decision which has construed the section and predecessor limitations.

With the one exception, the decisions have fixed the pattern, in respect to a variety of issues relating to application of the limitations, that lapse of the statutory period "not only bars the remedy but destroys the liability." That is true of this Court's decisions[18] and those of the inferior federal courts.[19] It is true of suits by shippers against carriers and of suits by carriers against shippers.[20] It is true with respect to every limitation imposed by Section 16, unless that of subdivision (a) in favor of the carrier is to be excepted when its suit is for the full amount of its charges, though not when it is for only part of them.[21]

The purport of the decisions is that Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished. Thus, in *A. J. Phillips Co.* v. *Grand Trunk Western Ry.*, this Court held the objection to the timeliness of the shipper's suit properly was raised by demurrer.

[17] Cf. note 15 *supra*.

[18] Cf., e. g., A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U. S. 662; United States *ex rel.* Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638; Kansas City So. R. R. v. Wolf, 261 U. S. 133; Danzer & Co. v. Gulf & Ship Island R. R., 268 U. S. 633.

[19] Cf. Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. 2d 459 (C. C. A.); Button v. Atchison, T. & S. F. Ry., 1 F. 2d 709 (C. C. A.); Pennsylvania R. R. v. Carolina Portland Cement Co., 16 F. 2d 760 (C. C. A.).

[20] Cf. notes 18, 19 supra.

[21] Cf. note 7 *supra*.

d said that "the lapse of time . . . . destroys the liability . . . ether complaint is filed with the Commission or suit is brought a court of competent jurisdiction." 236 U. S. 662, 667. And assigned as a reason for this view "the requirements of uni-mity which, in this as in so many other instances must be ne in mind in construing the Commerce Act," including the rier's obligations to adhere to the legal rate, make only lawful unds, and refrain from discriminating among shippers "by nce or by express waiver, to preserve to the Phillips Company ight of action which the statute required should be asserted hin a fixed period." *Ibid.* In *United States ex rel. Louis-le Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. , the conception of the *Phillips* case was applied to proceed-s before the Commission, as the *Phillips* opinion had forecast. e Court held that the limitation goes to the Commission's isdiction, so that on the one hand it has no power to act when time has expired, on the other mandamus will lie to compel rcise of the jurisdiction when the period has not passed.[22] e other decisions cited above give effect to this pattern in ious applications.

Respondent attempts to avoid the conclusion to which the tern points by urging that when the choice of extending the iod is the carrier's rather than the shipper's, opportunities discrimination disappear; and the policy otherwise embedded Section 16 does not require enforcement of its terms. Rather, ays, to enforce them would violate the very policy upon which *Phillips* case based the carrier's immunity to suit after the iod. And further to support this view, especially as it re-es distinguishing results favorable to the carrier from those erse to it, it is said the legislative history of the incorpora-f into Section 16 of the limitation upon the carrier's recovery its full charges requires it to be given a different effect from t given all other limitations created by the section.

The argument is ingenious, but not convincing. In the absence explicit direction, it cannot be assumed or inferred that Con-ss intended to adopt one policy for the carrier and another the shipper, to give the former an absolute shield, the latter

[22] The latter was the particular result in the case, since the court found the od had not run prior to beginning of the proceeding.

one penetrable by all the devices and occasions which interrupt or extend the period of an ordinary general statute of limitations. Still less can it be implied that Congress intended the identical provision, subdivision (a), to work one way when the carrier sues only for part, another when it sues for the whole of its charges. That it is prohibited to discriminate among shippers, in applying the section's limitations, does not mean that in adopting them Congress intended to discriminate against all shippers in favor of the carrier. Nor does it mean the carrier may discriminate among shippers when it sues for all, but may not do so when it sues for only part of its charges. The fallacy is in assuming, first, that the section reflects only the Act's general policy against discrimination in respect to rates, rebates, etc.; and, second, that this would be made effective by treating the limitation as absolute to cut off the carrier's liability, but variable when the shipper's is involved. Neither assumption is true.

That the section does involve the statute's general policy against discrimination is clear from the opinion in the *Phillips* case and others cited. But this is true only so far as that policy is consistent with the particular policy laid down by the section, namely, that of strictly limiting the time within which claims may be asserted, as likewise appears from the decisions. In the *Phillips* case, there was no apparent clash between the two policies. Nor in this case is there more than an apparent one.

It is true the effect of holding the period invariable will be, when it has run, to relieve the shipper entirely of paying; and thus the carrier, by agreeing not to sue until later, may in effect allow the shipper a preference. But it has this within its control. And the same effect may follow when the amount unpaid is only a part of the total charge. It may follow in any case, whether the suit is for all or merely part, since the carrier, without agreement, may neglect or fail to sue and thus in effect allow the preference. Likewise, when the shipper sues, the carrier may suffer judgment by confession or default and so, in effect, accomplish the "preference," if the amount claimed is more than is rightfully due the shipper. When it is that and no more, allowing the carrier to escape by pleading the bar of the statute has the effect of permitting it to inflict a discrimination, as respondent concedes the statute requires.

The concession destroys its case. The consequences for discrimination are the same, whether the carrier or the shipper sues, since in the one case it may create a preference by foregoing suit, in the other by failing to defend. And it is as much an answer, in the one case as in the other, that the carrier's failure to assert its rights would violate its duty to collect.[23] That duty, and the results of failure to discharge it, may be the same, regardless of whether the carrier sues or defends depending upon whether the amount claimed is rightfully due.

The paramount policy of Section 16 is to secure promptness in collection. That policy would not be promoted by construing the period as variable when it works to bar the carrier's claim but invariable when the shipper sues. Nor does a legislative history which discloses a purpose to put carrier and shipper in equal position with reference to limitations of time sustain an inference that they are to be given effects favorable only to the carrier.

We are not unmindful of the hardship to respondent in the special circumstances, though petitioner asserts it would suffer equal hardship if the decision were the other way. Nor do we ignore the strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest, might move against denying effect to such an agreement. But this case boils down to an old adage about sauce and geese, which need not be given citation.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

[23] Cf. A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U. S. 662, 667-668; Arkansas Fertilizer Co. v. United States, 193 Fed. 667, 671 (Commerce Court).